



# **STATE OF COLLECTIVE REDRESS IN THE EU IN THE CONTEXT OF THE IMPLEMENTATION OF THE COMMISSION RECOMMENDATION JUST/2016/JCOO/FW/CIVI/0099**



**British Institute of  
International and  
Comparative Law**

Prepared by The British Institute of International and Comparative Law  
[November 2017]

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the European Commission.

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# SYNTHESIS REPORT

## I. Introduction

The British Institute of International and Comparative Law (BIICL), in a research consortium with Civic Consulting and Risk & Policy Analysts (RPA), and supported by the Office for Economic Policy and Regional Development (EPRD), has been commissioned to analyse the state of collective redress in the European Union in context of the implementation of the Commission Recommendation (2013/396/EU) on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (request for services JUST/2016/JCOO/FW/CIVI/0099, Lot1/2016/06).

### 1. Background

According to the Commission Recommendation (2013/396/EU), Member States should have collective redress mechanisms available to achieve EU policy objectives such as better enforcement of European Union law, protection of consumers, improvement of access to justice, better efficiency of justice systems, avoidance of abusive litigation and an effective right to compensation. The Recommendation provides for its implementation by July 2015 and for a reassessment of the collective redress landscape across the EU by July 2017.

The present study carries out a first assessment and its output will assist the Commission in evaluating if the Recommendation has led to the introduction or development of efficient collective redress regimes in the Member States; whether these regimes coherently take into account the principles set out by the Recommendation; and whether the Recommendation has achieved its policy goals.

### 2. Structure

The study consists in four main parts:

A **legal study** presenting **national reports** covering each of the 28 EU Member States and preceded by a short **fact sheet** for each jurisdiction.

An **empirical study**, consisting of a **short country overview** for each jurisdiction, followed by the **empirical findings per country** which are based on qualitative interviews and an online survey which was distributed amongst stakeholders with relevant experience in the area of mass claims in each Member State.

A **comparative table** summarising the legal issues and practical problems with the Recommendation across all Member States.

A **synthesis report** summarising the **legal and empirical findings across all Member States** for each principle of the Commission Recommendation on Collective Redress

### **3. Methodology**

#### **a. National Reports**

A team of national experts assessed the situation in their Member States in light of the Recommendation. Where a country provides for (a) mechanism(s), experts gave an overview of their system and explained in detail problematic issues (such as, for example, the consequences of an opt-out or opt-in approach, of contingency fees and of third party funding structures). They also examined how information on mass harm situations and on collective claims is distributed.

The main focus of their assessment was on whether the features of their national mechanism(s) comply with the principles of the Recommendation, in particular in light of cross-border collective redress, mass compensatory claims, access to justice, fairness of proceedings, risk of abusive litigation, and an effective right to obtain compensation. Experts also included national legislation and links to legislative materials and a table with short case briefs on collective claims and settlements, highlighting whether redress was effectively obtained or not.

Where no collective redress mechanism exists, national experts explained whether and how mass claims are dealt with and which consequences arise due to the lack of a collective redress mechanism.

#### **National Experts – Legal Study**

National Experts were: Prof Georg Kodek, Wirtschaftsuniversität Wien, Austria (AT); Olivier Vanhulst, Freshfields, Belgium (BE); Dr Valentina Bineva, Bulgarian Academy of Sciences, Bulgaria (BG); Prof Paula Poretti, University of Osijek, Croatia (HR); Prof Nikitas Hatzimihail, University of Cyprus, Cyprus (CY); Dr Klára Hamuláková, Palacký University Olomouc/ Czech Constitutional Court, Czech Republic (CZ); Anders Schäfer, Kammeradvocaten Law Firm Poul Schmith, Denmark (DK); Prof Katrin Nyman-Metcalf, e-Governance Academy, Tallinn/ University of Technology, Estonia (EE); Prof Katja Gabriella Lindroos, University of Eastern Finland, Finland (FI); Dr Duncan Fairgrieve, BIICL/ Université Paris Dauphine and Constance Bonze, BIICL, France (FR); Prof Eva Lein, BIICL/UNIL, Germany (DE); Prof Alexandra Mikroulea, Athens University and Alsarif Satti, BIICL, Greece (EL); Andrea Fejős, University of Essex, Hungary (HU); Asaf Niemoj, BIICL, Ireland (IE); Prof Eleonora Ranjeri and Prof Cristina Poncibò, Università di Torino, Italy (IT); Dr Inga Kačevska, University of Latvia, Latvia (LV); Prof Vytautas Myzaras and Prof Danguole Bubleiene, Vilnius University Lithuania (LT); Constance Bonze, BIICL, Luxembourg (LU); Clement Bonnici, Ganado Advocates, Malta (MT); Prof Eric Tjong Tjin Tai and Prof Ianika Tzankova, Tilburg University, Netherlands (NL); Dr Magdalena Tulibacka, Oxford University, Poland (PL); Rafael Vale e Reis, University of Coimbra, Portugal (PT); Dr Valentin Mircea, Mircea Lawyers, Romania (RO); Dr Jerca Kramberger, University of Ljubljana, Slovenia (SI); Dr Klára Hamuláková, Palacký University Olomouc/ Czech Constitutional Court, Slovakia (SK); Dr Marta Otero Crespo, University of Santiago de Compostela, Spain (ES); Prof Annina Persson Orebro University, Sweden (SE); Vincent Smith, BIICL/ ESCP, United Kingdom (UK).

## **b. Interviews and Questionnaire**

The empirical part of the study assessed how national collective redress regimes are applied in practice, how well they operate and which problems arise from the perspective of their users. To achieve significant results in the short timeframe available, the study adopted two different methods:

**E-questionnaire:** A detailed online questionnaire, tailored to the aims of the project, was made accessible to selected stakeholders across all Member States. The collected data were processed through the online system *SurveyMonkey* ([www.surveymonkey.com](http://www.surveymonkey.com)) to ensure an objective and reliable outcome.

**Qualitative individual interviews:** These were conducted by BIICL, Civic Consulting, Risk & Policy Analysts (RPA) and the Office for Economic Policy and Regional Development (EPRD). Interviews took place via telephone with a selection of the key players in each EU jurisdiction from the below mentioned categories of individuals and entities involved in collective redress. Interviews were conducted in English, or, where problematic for the interviewee for linguistic reasons, in the interviewees' mother tongue. As interviewers followed the structure of the e-questionnaire, interview data could be manually added to SurveyMonkey and evaluated together with survey data. Detailed comments relating to practices and practical problems raised by each interviewee were, in addition, evaluated manually and added to the system.

**Selection of Stakeholders:** Stakeholders were selected exclusively amongst individuals and organisations which have practical experience with mass claims. Stakeholders comprise: claimant and defendant lawyers; judges; organisations representing claimants in various areas such as consumer protection, environmental law, fundamental freedoms or data protection; defendants (businesses including SMEs) and business organisations representing them; public authorities representing claimants (e.g. ombudsmen); academics specialised in the area of collective redress and experts involved in law reform.

### **Participating Stakeholders - Empirical Study**

In total, 136 respondents with practical experience in mass claims or with legal reform in the area of collective redress participated in the study. From these, ca 40 % were interviewed and 60% participated in the online survey. Stakeholders comprise:

24 lawyers representing claimants

17 lawyers representing defendants

21 lawyers representing both.

25 organisations representing/ potentially representing claimants

10 organisations representing/ potentially representing defendants

1 claimant

4 defendants

5 public authorities representing claimants

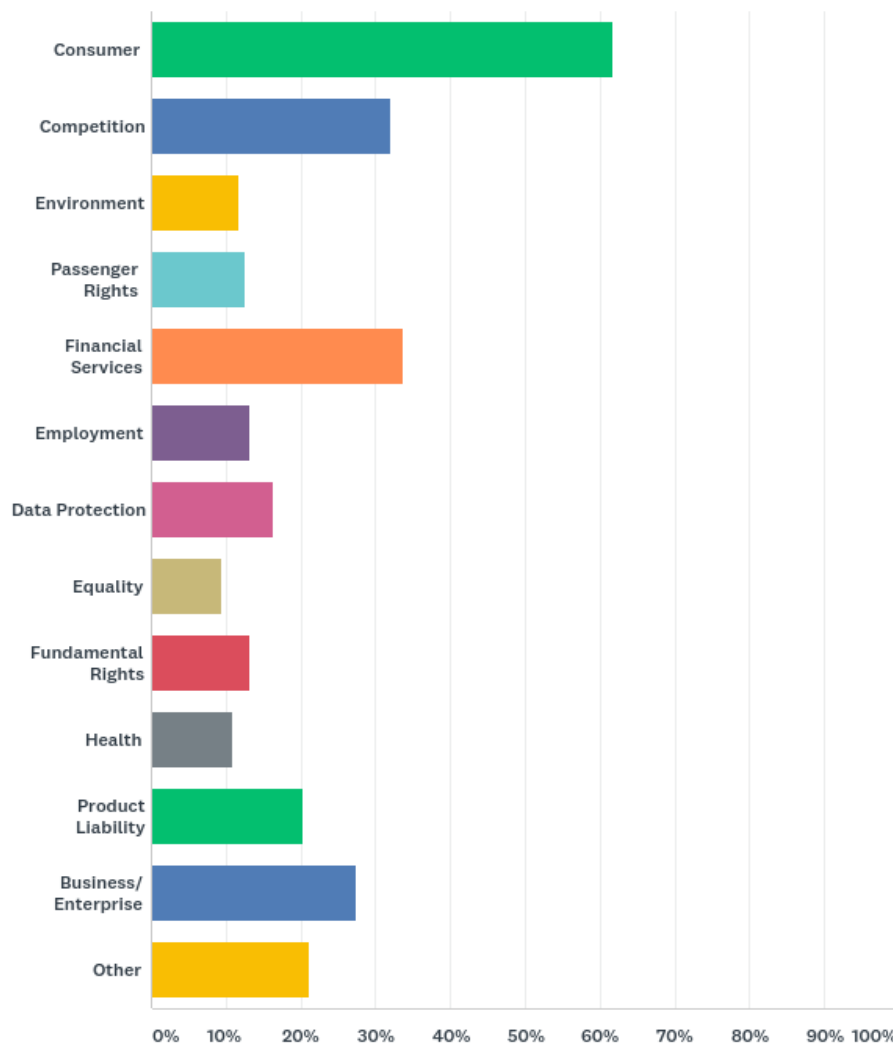
13 judges and

25 categorising themselves as “other” (including academics, ministry representatives, representatives of authorities).

Respondents covered a range of different sectors, most prominently consumer law, competition law and financial law.

### Q3 Please select your field of expertise

Answered: 128 Skipped: 8



Of the 128 respondents stating their expertise, **50 have been or will be involved in collective actions on the claimant side. 30 respondents indicated they have or will be involved in collective actions on the defendant side.** Some respondents are associations representing claimants or defendants but have not been involved in collective redress in practice.

When asked to specify how many collective claims have been brought and defended, 27 respondents stated that they had been involved in injunctive collective redress, 38 in compensatory collective redress, and 24 in a combination of both. The data show that they mostly have experience with



judgments (75%), but also with settlements (37.5 %), ADR (35%), and administrative decisions (22 %).

## **II. Collective Redress in the Member States – Legal and Empirical Data**

### **1. Availability and Scope**

Across the EU there is a broad patchwork of different collective redress mechanisms and national systems use a variety of different expressions to describe these. Various jurisdictions introduced collective redress only recently, after the Commission Recommendation was published (e.g. France, Belgium, UK), or have engaged in recent reform efforts (e.g. Lithuania, Malta, Slovenia).

Generally, collective redress can be classified into the following categories, depending on the scope of the respective mechanism:

#### **a. Injunctive or compensatory collective redress**

Following the implementation of directive 2009/22/EC, EU jurisdictions generally have specific provisions enabling associations to bring **injunctive** claims protecting the interest of their members, for instance against a defendant who uses unfair contractual terms or unfair business practices harming large groups of consumers.<sup>1</sup> Furthermore, injunctive relief might be available in other areas of the law, depending on the Member State.

On the contrary, **compensatory** collective redress enabling large groups of victims to claim damages is **not broadly available**. Several jurisdictions do not provide for any proper compensatory collective redress regime (e.g. Cyprus, Ireland, Estonia, Czech Republic, Slovakia, Latvia) or offer a collective mechanism that is limited to a specific sector or certain sectors only (e.g. Germany, Belgium).<sup>2</sup>

#### **b. General / horizontal or sectoral mechanisms**

Most jurisdictions do not have a regime specifically tailored to mass claims which potentially covers all types of claims across various sectors (a **“general”** or **“horizontal”** regime). Exceptions are e.g. collective settlements in the Netherlands; group/collective actions in Bulgaria, Lithuania, Malta, Sweden, class actions in Denmark; group litigation orders in the UK; and the forthcoming collective actions in Slovenia).

In default of specific provisions, many jurisdictions resort to **traditional devices of multiparty practice** to tackle mass claims in practice, in some instances backed up by third party litigation funding (see e.g. Austria). These

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<sup>1</sup> For details see below, 9. See also the instruments listed in the Annex to Directive 2009/22/EC. It is to be noted that for the purposes of this study, the term “injunctive relief” refers to injunctions across all areas of law and is not limited to the area of consumer law. Furthermore, the term “injunctive relief” is not necessarily understood in the same way across Member States (it can comprise both an interim order or a definite measure establishing a breach of the law or prohibiting an illegal practice).

<sup>2</sup> For details see below, 10.

traditional procedural devices can either be a **joinder** of claims and **stay** of proceedings; or the **assignment** of claims to a specific organisation or SPV, which then brings the claims to court (as tested in practice e.g. in Germany, Austria, the Netherlands, Finland). In some countries these traditional procedural devices are the only option to handle instances of mass compensatory claims (e.g. in Austria, Cyprus, Ireland, Estonia, Czech Republic, Croatia, Slovakia, Latvia, Romania, Luxemburg). In other jurisdictions, they are used as an alternative to other existing regimes such as collective settlements (e.g. in the Netherlands) or they supplement strictly sectoral compensatory mechanisms (e.g. in Germany).

As to **sectoral** collective redress, the picture is very varied. Many countries have a compensatory collective redress regime which is limited to specific sectors (e.g. to investor claims in Germany; to consumer cases in Belgium) or which extends to a plurality of different sectors (e.g. in Hungary to consumer, competition and financial claims; in Poland to consumer cases, competition law, product liability and other torts; in Portugal to public health, environment, quality of life, protection of consumers, cultural heritage; in Spain to consumer, competition, discrimination, environmental and labour law; and in France the "action de groupe" is used for consumer cases, competition law, health, discrimination, environment and personal data cases).

### c. Actions v Settlements

While most countries introducing collective redress mechanisms provide for specific types of collective **actions** (e.g. France, Belgium, Lithuania, Spain, Portugal), others have collective **settlement** mechanisms (in particular the Netherlands with the WCAM settlements, but also the UK (settlement option in competition law) or Germany (settlement option in KapMuG cases)).

More often, settlement options are provided for **within** a collective action regime and parties are encouraged to settle (see e.g. the settlement option in the German KapMuG, see also Croatia or Spain) or mandatory settlement attempts are prescribed by law (see e.g. Belgium, Bulgaria).

Frequently, out of court settlements need to be court approved (see e.g. the Netherlands, Denmark, France, Malta, and the draft Slovenian legislation), but a court control, while frequent, does not occur everywhere (e.g. in Croatia, courts are not entitled to verify the content of a settlement reached by the parties).

Collective settlements in the Netherlands and settlements under the German KapMuG are based on an opt-out approach.<sup>3</sup>

### d. Types of collective actions

The types of collective actions vary considerably, as well as the **denominations** used for these actions in national law: collective actions/group actions (most frequent) 'class' actions (see e.g. the Danish or Polish models), representative actions (mostly injunctive), test or model case proceedings (e.g. Germany), Group Litigation Orders (GLOs, UK), popular

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<sup>3</sup> See below, 4.

actions (e.g. Portugal), or - aside from actions - collective settlements (the Netherlands).

It should be noted that each regime can only be properly understood in the national context and considering its specific characteristics. Denominations of collective mechanisms can be misleading. The "Austrian style group action" provides a good example – unlike in France, Belgium or Lithuania, it is not a proper legal collective redress framework but merely an extension of traditional multiparty litigation devices to mass claims, established by case law. On the other hand the French term "action de groupe" can be equally misleading, as such action can only be brought by associations fulfilling strict criteria.

## 2. Standing

Provisions on standing depend again on the regime available in each country.

There are usually precise criteria on standing for **injunctive** relief (in principle only associations fulfilling specific criteria can represent victims of mass harm in proceedings for injunctive orders). To give examples, in Bulgaria, standing is granted to registered and qualified consumer protection associations; in the Czech Republic, to associations or professional organisations with a legitimate interest in consumer protection or qualified listed entities; or in Greece, to consumer associations which fulfill specific criteria.

Respondents were asked whether they thought criteria for standing in **representative actions** were clearly defined. While 70 % thought this was the case, roughly 30 % found the definition unclear. When asked whether representative entities needed to be certified in the respective Member State, around 52 % of the respondents confirmed a certification requirement, while 48% stated that certification was not needed. Thirty-eight per cent of 38% of the respondents added that an ad hoc designation of representative entities is possible in their Member State. Mostly, certification is regulated by law, but in some instances carried out by courts or the government.

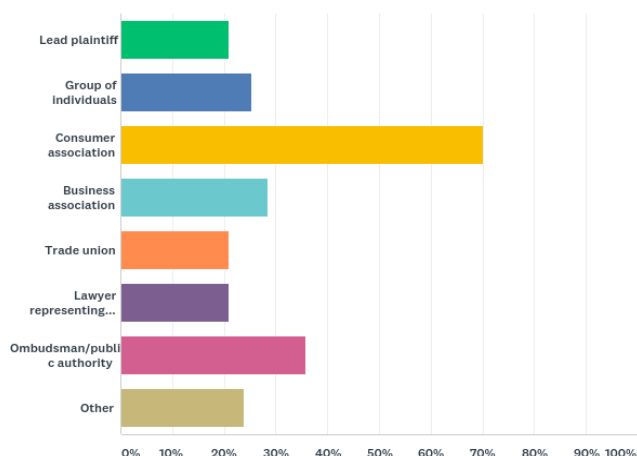
Seventy four respondents commented further on the requirements to which representative entities are subject. Of these, 67 % confirmed that representative entities must have a non-profit making character in their respective Member State. Moreover, 51 % said they are required to have sufficient capacity in terms of financial resources, human resources, and legal expertise. 57% stated that they need to have a direct relationship with the rights that are claimed to have been violated.

Of 76 commenting respondents, 54% indicated that there is no publicly available list of representative entities in their country.

Respondents described standing in injunctive relief cases as follows:

### Q26 In case of injunctive relief, who has standing?

Answered: 67 Skipped: 69

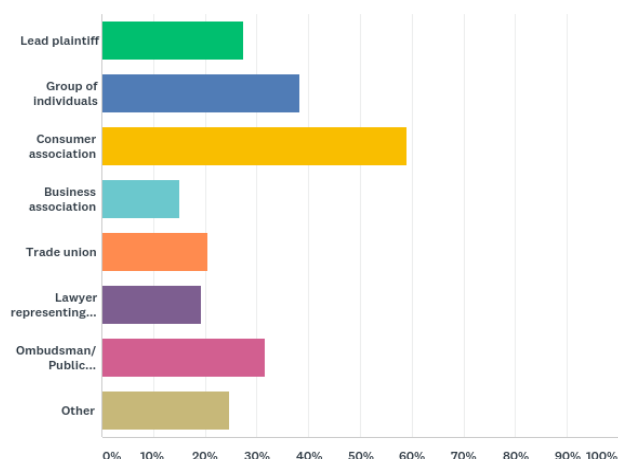


Standing for **compensatory** collective redress also varies from regime to regime. In cases in which the assignment model is used (victims assign claims to a specific organisation or SPV which brings the claim), standing is with the assignee. Who qualifies as an assignee can be specified by court or by law (see e.g. Germany and Austria). In test case proceedings standing is granted to a test case claimant (e.g. Germany). In group actions, standing can be either with an ombudsman (e.g. Finland, Sweden, Belgium), or with an association representing victims (e.g. France or Belgium) or a group representative (e.g. Lithuania, Malta).

This diversity has been reflected below by 73 respondents to the empirical study:

### Q25 In case of compensatory collective redress, who has standing?

Answered: 73 Skipped: 63



According to the stakeholders, standing is also granted to **foreign entities or claimants**. Seventy eight per cent of the 76 respondents commenting on this issue stated that foreign claimants have standing in injunctive claims - compared to 76% who confirmed standing of foreign claimants in compensatory claims.

In some **Member States**, problems as to standing have been highlighted. In **Croatia**, criteria for standing are reportedly not clearly defined. One stakeholder in the consumer sector commented that “conditions for standing prescribed in the Consumer Protection Act (CPA) are arbitrary and dependent on the will of the legislator. Given that CPA prescribes that standing will be afforded to certain associations and entities by a Decision of the Croatian Government, there is no possibility for other associations to initiate collective redress proceedings. Not only is such a provision limiting to the efficiency of collective redress proceedings, it provides no possibility for a change.” In **France**, respondents are divided regarding restrictions on standing. One respondent prefers strict requirements and the exclusion of “ad hoc” entities, as is the case in French law. They also think the scope of standing implemented in the new group actions in environment and health law is too broad. In environment matters, certification can be given for broad goals, for instance “defence of the economic interests” of the members of an association. Regarding discrimination, associations just need to self-declare, with no need for agreement or certification.

Another respondent agrees, mentioning the requirements for sufficient resources and years of existence are necessary to ensure efficient proceedings. They also mention the broad scope of standing in the sector of health law, where around 480 associations have standing to bring a claim. This is way more than the 15 associations accredited in consumer law, and it raises concern whether or not all these associations have sufficient experience or means to bring a claim. On the other side, one respondent thinks the ‘one year of existence’ requirement for consumer matters limits the flexibility necessary in certain cases. Representative entities cannot be designated ad hoc, although ad hoc entities are particularly relevant in certain specific cases, such as those involving passenger rights in accident claims.

In **Italy**, criteria for standing are reportedly not sufficiently defined, similarly in **Romania**. In **Malta**, standing in cross-border claims is de facto limited as stakeholder comments are that proceedings in English “are not easily accommodated”. In **Lithuania**, stakeholder comments have shown that the criteria for group representatives are interpreted too strictly. In **Germany**, standing in cross-border KapMuG proceedings has proven difficult in practice as foreign claimants faced administrative hurdles to prove their legal capacity.

### Problems reported as to criteria for standing

Austria	Belgium	Bulgaria	• Croatia	Cyprus	Czech Republic	Denmark	Estonia	Finland	• France	• Germany	Greece	Hungary	Ireland	• Italy	Latvia	• Lithuania	Luxembourg	• Malta	Netherlands	Poland	Portugal	• Romania	Slovakia	Slovenia	Spain	Sweden	UK	Number of countries
																											27	

### 3. Admissibility

Criteria for admissibility of a claim vary depending on the type of claim and on the country.

For mass claims based on a **discretionary joinder** of claims, the court will assess early on whether the legal criteria for a joinder are fulfilled (e.g. Austria, Czech Republic, Slovakia). Claims might or might not be bundled, depending on the criteria for a joinder and the circumstances of the case.

In cases based on mass **assignments**, courts test criteria which can be distinct in each jurisdiction. E.g. in Germany, the availability of sufficient funds of the assignee at the time of the assignment to cover procedural risks is a criterion tested by the court while other jurisdictions have admitted assignment-based claims based on a more flexible approach, e.g., the **Netherlands**. Such specific requirements fixed by courts led to practical problems at the admissibility stage and it was stated by a German claimant representative that a more pragmatic and flexible approach would be needed to satisfactorily address mass claims situations.

For **collective actions**, national laws provide for a variety of admissibility criteria: in **Denmark**, for instance, the court examines several principles (common claim, jurisdiction over all claims, expertise of the court, class actions superior means of dispute resolution; class members can be identified; appropriate representative); in **Finland**, the court examines whether all claimants have similar claims against the same defendant, the claimant party can be specified and the use of collective redress is appropriate. In **Italy**, the court verifies if there is a conflict of interest, if the main claimant can adequately represent the interest of the class and if the rights of the class members are homogeneous. In **Belgium** and **Lithuania**, it needs to be shown to the court that collective proceedings are more effective than ordinary proceedings. In the **UK**, three requirements are tested (for collective competition law claims): whether claims are brought on behalf of an identifiable class of persons; whether claims raise common issues and whether they are suitable for collective proceedings.

Stakeholders from eight **Member States** identified problems during the admissibility stage. The vast majority of those stakeholders are lawyers, with the exception of two consumer associations (from Luxembourg and Spain respectively).

The main problem raised by all of them is the **length** of the admissibility phase. Half of the Danish respondents identified additional time taken to resolve admissibility questions in the proceedings as a concern. **French, Polish and Danish** lawyers all pointed out that the admissibility phase in their respective countries usually takes at least two years (the total average duration of a non-collective case brought before the court of first instance in Poland, for instance), ultimately excessively extending the duration of the proceedings (over a period of seven years in **Spain** to reach a first instance judgment). A **Bulgarian** law firm qualified admissibility requirements as "time consuming", while a **Luxembourg** consumer association argued the reluctance of Luxembourg to implement a comprehensive horizontal collective redress mechanism was due to "the length and complexity of the proceedings, especially during the admissibility phase, that make collective redress a slow and costly procedure". A Danish lawyer recommended a "set time" imposed on the courts to answer admissibility questions.

The difficulty of satisfying the courts admissibility requirements was another issue raised by the respondents. In **Bulgaria**, two law firms pointed out that

the admissibility phase is “too formalized”. They cited procedural hurdles and time consuming requirements being enforced very strictly by Bulgarian courts, in particular during the constitution of the class and in identifying and quantifying harm. One of the stakeholders ventured that “class action had a difficult start in Bulgaria, partly because of the higher hurdles for admissibility of class claims”. All the **Lithuanian** lawyers interviewed were of the view that the restrictive approach taken by the courts on admissibility and certification should be relaxed. In **Germany**, collective redress based on the assignment model was challenged due to court imposed requirements regarding assignment formalities and funding of the claim. A French lawyer gave a practical example, questioning why the identification of a definite damage was a condition of admissibility in the sector of data protection, where the collective redress mechanism is only injunctive, and the harm particularly difficult to quantify.

### Problems relating to admissibility

Austria	Belgium	Bulgaria	Croatia	Cyprus	Czech Republic	Denmark	Estonia	Finland	France	Germany	Greece	Hungary	Ireland	Italy	Latvia	Lithuania	Luxembourg	Malta	Netherlands	Poland	Portugal	Romania	Slovakia	Slovenia	Spain	Sweden	UK	Number of countries
		•				•			•	•						•	•			•					•			↘

### 4. Opt-in / Opt-out

In opt-in regimes, participants in a collective action have to actively join it and are not automatically included in the action. In opt-out regimes, every victim falling within the parameters of the group or class on behalf of which an action is brought or a settlement negotiated, will automatically be included, unless the putative class member opts-out.

Most legislations providing for collective redress follow an opt-in principle. Where mass claims are handled via joinder or assignment, this is equivalent to an opt-in, as victims actively decide to be part in proceedings (see e.g. **Austria, Germany, Finland, the Netherlands**). The same is true for test case proceedings under the German KapMuG or GLOs in the **UK**.

As to proper group actions – again, in many countries, the opt-in principle is strictly followed (e.g. **France, Lithuania**) but there is a recent **trend towards a more flexible approach**, depending on the necessities of the case. In practice, it has become apparent that while opt-in might work for high value cases it e.g. might not for low value mass consumer harm. Some jurisdictions address this issue in a novel way: **Belgium** has adopted an approach in which the parties or the court decide whether a case should be dealt with on the basis of an opt-in or opt-out, depending on the specifics of the case. Similarly, in **UK** competition law cases, both an opt-in and opt-out approach are allowed depending on whether the latter is necessary in the interest of justice. Likewise, the new **Slovenian** legislation provides for both opt-in and opt-out procedures at the discretion of the judge who takes his

decision considering all circumstances of the case. Also in **Denmark**, both opt-in and opt-out are available.

At the other end of the spectrum, **Portugal** follows the opt-out principle. The **Dutch** WCAM provides for out of court opt-out settlements. **German** settlements under the KapMuG also follow the opt-out principle.

As to more precise figures based on stakeholders' views participating in the empirical study: 16 respondents (24%) out of 67 commenting on this point stated their country follows an opt-out principle and 30 (45%) come from countries with opt-in regimes. 15% (10 respondents) answered that their country follows a flexible either/or approach, depending on the subject area of the claim; and 16 % (11 respondents) stated that the use of either opt-in or opt-out would depend on the specifics of the claim.

The advantages and disadvantages of opt-in versus opt-out regimes were described by the respondents as follows:

**Opt-out:** Respondents were asked the question whether opt-out caused any problems in relation with access to justice, costs of proceedings, speed of proceedings and enforceability. Only 16 respondents answered this question. Of these, 20 % found access to justice significantly more complicated, 53 % found it more complicated. Twenty one per cent thought costs would be very much increased, while 29 % thought they would be increased. Some respondents (21%) agreed that the speed of proceedings would be very much increased and 42 % said it would be increased. Half of respondents found enforceability more complicated, while 17% found it simplified and a further 17 % very easy.

**If presented from the perspective of claimants and claimant representatives, the results are as follows:** 9 out of 50 stakeholders that have been or will be involved in collective redress on the claimant side commented on the difficulties with opt-out mechanisms. Of these 9, 6 found access to justice more complicated in opt-out scenarios; on the other hand, 5 stakeholders found that speed of proceedings was either increased or very much increased. As to enforceability and costs, opinions were split. Three stakeholders found enforceability more complicated; the others saw no change or found enforceability improved. As to costs, 2 thought they were increased, 2 thought they were decreased, and others saw no change.

**Opinions from the perspective of defendants and defendant representatives are the following:** Out of the 30 stakeholders who defended a claim or plan to do so a few only commented on the impact of an opt-out regime. All 5 commenting found access to justice more complicated to significantly more complicated. Three found costs to be increased and, again, three found enforceability to be more complicated. On the other hand, three stated that speed of proceedings was increased

From the viewpoint of **different jurisdictions** where an opt-out regime is available, its negative impact on access to justice and the duration of proceedings appears to be the main concern for the respondents to the question, and in particular lawyers. In **Belgium**, where an opt-out mechanism can be selected by the parties or by default by the court, 2 lawyers out of 5 respondents found access to justice "more"/"significantly



more" complicated ; out of the two, one was involved in collective redress in practice. From the **Netherlands**, 3 out of 4 respondents (all of them lawyers except for one litigation funder) commented on this question. Amongst these, 2 lawyers found access to justice "more complicated". Out of the two lawyers, one was involved in collective redress.

The increased duration of proceedings and increased costs were also problems mentioned by the **Belgian and Dutch** respondents. In **Bulgaria**, 37% of the respondents answered the question (all lawyers) with, among them, 67% concerned for the impact on access to justice and the increased costs, and all of them finding enforceability more complicated. In **Portugal**, one of the respondent explained the fact that no particular problem was identified regarding the opt-out method: the collective redress mechanism was rarely used in practice.

**Opt-in:** The same question was asked, in the context with opt-in regimes (problems as to access to justice, costs speed of proceedings, and enforceability). Of the 20 respondents to that question, 6 % found access to justice via an opt-in regime significantly more complicated and 56 % more complicated. In contrast, 31 % thought opt-in regimes were simplifying access to justice or rendering it very easy. 18 % thought costs were very much increased and 35 % thought they were increased while 24 % found no change in costs and 24 % thought they were decreased or very much decreased. As to speed of proceedings 11% thought it was very much increased by an opt-in regime; 22 % thought it was increased; 28% found no change; while 40 % thought it was decreased or very much decreased. As to enforceability, 15% found it significantly more complicated; 31 % more complicated; and 38 % thought there was no change. Only 15 % thought it was simplified or very easy.

An assessment of opt-in regimes from the **perspective of claimants and claimant representatives** was made by 13 out of 50 stakeholders that have been or will be involved in collective redress on the claimant side. They commented on problems arising with such mechanism, although not all 13 assessed each of the aspects mentioned in the following. 10 stakeholders (83%) found access to justice under an opt-in system more/ significantly more complicated. 5 felt that costs would be increased/ very much increased. 5 thought speed of proceedings was decreased/ significantly decreased, while 4 felt that speed rather increased/very much. Half of the stakeholders commenting on this point found enforceability to be 'more complicated' to 'significantly more complicated'.

From the **perspective of defendants and defendants' representatives** all 4 stakeholders commenting on the impact of an opt-in regime said that it would render access to justice more complicated. Costs would be increased/ very much increased, which would "narrow the scope and types of claims being brought via a collective mechanism". On the other hand it was considered that "the impact of such increase in state/government related cases is mitigated by the availability of public funding." Three thought speed was increased while 2 found enforceability to be more complicated. Stakeholders commented that opt in does not really work as a regime: "It fails to really bring everyone together, if individuals are not motivated to start a claim then they will not be motivated to join one. Opt-in does not really bring any finality for the defendant." One stakeholder also criticised the fact



have to bear the financial risk of bringing and losing a case which can be a disincentive for bringing claims (even injunctive relief).

Lack of sufficient funding is an issue raised by several stakeholders. Overall, 13 % stated that a lack of funding is one key reason not to seek compensatory collective redress. In **Greece**, one respondent commented that the funding restriction upon associations (i.e. that they can only rely on membership fees to fund their claims) was a predominant factor in their decision not to resolve disputes via collective procedures. Additionally, a Greek legal practitioner representing claimants was of the view that third party funding should be allowed for collective claims. In **Latvia**, two consumer associations pointed out the difficulty for Latvian consumer organisations to go to court in light of the lack of funding. Similarly, in **Slovenia**, a consumer organisation expressed the concern that without proper resourcing, the number of collective actions that could be brought in practice would be limited. In **Hungary**, a public authority representing claimants indicated that “NGOs complain they are not sure whether to start cases because of the court fees and the financial risks involved on their side”.

In some Member States, third party funding has become an essential factor in the realisation of collective redress. It is an important mechanism whereby litigation costs are paid for by a party unconnected to a dispute, in exchange for an agreed percentage of any recovery, similar to a contingency fee arrangement offered by a non-party. Third party funders have/are e.g. financing claims in **Austria, Germany, the Netherlands, the UK and Sweden**.

In other countries, third party funding is not known in practice (e.g. **Croatia, Cyprus, Italy**) or prohibited, notably in countries with no proper collective redress mechanism (e.g. **Estonia, Greece, Ireland**).

In countries where third party funding is unregulated, some respondents expressed concern over the need for regulation, as collective redress is picking up steam. Among those requesting more regulation, **Slovakian** respondents highlighted the potential influence of funders on the proceedings, and a French organisation representing defendants put forward that “the main abuses observed in the countries where class actions flourish are explained by poorly supervised funding conditions, leading to the excessive remuneration of third parties to the detriment of the victims”.

In most jurisdictions, third party funding is not specifically regulated, even where it is practised (see e.g. **Germany, Austria, Finland, the Netherlands, Poland**). This has given rise to some concerns, although reports of abuse, conflict of interests and attempts of undue influencing by funders have not been frequent. Respondents from jurisdictions where litigation funding has developed, such as **Germany and the United Kingdom**, generally described third party funding as a positive element, and no major practical problems were raised. Some concern, although not prevalent, was raised surrounding regulation and control. In **Austria** for instance, the respondents (judges, lawyers, and an organisation representing defendants) expressed concern over conflicts of interest and undue influence. It was put forward that regulation is necessary as litigation funders “have a huge influence in practice on the proceedings”. It was reported that “in a high value claim, litigation funders had an impact on the question whether there



Respondents to the empirical study confirmed these findings: 78 % stated for injunctive relief and 76 % for compensatory redress that their national regimes would be open to foreign plaintiffs. Twenty six respondents had already acquired relevant experience with cross-border claims.

In injunctive relief cases, foreign associations can generally bring claims if they fulfill certain requirements (qualified registered/ listed entities, see e.g. in **Cyprus, Croatia, Bulgaria, Hungary**).<sup>4</sup>

Also in compensatory collective redress cases, a participation of foreign claimants is generally not excluded. Where the national regime follows traditional multiparty provisions or the assignment model (e.g. in **Austria, Germany, the Netherlands, Bulgaria**) participation of foreign claimants follows general rules on cross-border proceedings.

Additional safeguards regularly apply in those jurisdictions offering either opt-out or opt-in regimes, and where the choice between these regimes depends on the circumstances of the individual case: these usually provide for an opt-in regime for foreign claimants, even if the mass claim would be brought as an opt-out action by the domestic plaintiffs (see e.g. **Belgium and UK**). This secures that foreign plaintiffs are sufficiently notified.

Despite the general openness to cross-border cases, it was reported by respondents that there can be de facto procedural hurdles which can prove problematic for foreign claimants: e.g. a **German** lawyer representing claimant pointed out that if the defendant contests the legal capacity and standing of foreign claimants, the latter can face enormous bureaucratic hurdles to prove their legal capacity and standing. In **Bulgaria**, despite the apparent absence of procedural obstacles, a law firm mentioned potential problems regarding the complexity of the procedure: "where the plaintiffs allege that the harm extends beyond the territory of Bulgaria, the publication requirements would be expanded accordingly, which would create additional burdens for the initiation of class action proceedings". These difficulties may incite foreign claimants to not bring or to withdraw their claims.

Many respondents therefore found both cross-border collective injunctive and compensatory relief difficult: as to cross-border **injunctive** relief, 28 % found it extremely difficult (9 respondents), 37.5 % found it very difficult (12 respondents) and 31 % found it somewhat difficult (10 respondents). Only 1 respondent did not find it difficult.

From a **Member States perspective**, in **Spain**, where 36% of the respondents were involved in a cross-border collective action, those involved found the injunctive procedure very to extremely difficult. An organisation representing claimants cited the higher costs as the main difficulty. In **Estonia**, where a collective redress mechanism solely exists in the consumer sector and is injunctive, experience of cross-border class actions is limited. Nonetheless, the respondents (lawyers, consumer organisations and an academic) pointed out that a cross-border collective redress injunctive procedure would be somewhat to very difficult, mostly because there was no functioning mechanism of joining cases across borders. Similarly, in

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<sup>4</sup> In the area of consumer law, Article 4 of the Injunctions Directive regulates the question of legal capacity of qualified entities in cross-border cases.

**Romania**, all the respondents who answered this question found cross border collective redress in injunctive cases would be very difficult.

As to **compensatory** collective redress in a cross-border context: 22 % found it extremely difficult (9 respondents), 34 % found it very difficult (14 respondents) and 32 % somewhat difficult (13 respondents). 5 did not find it difficult.

Seen from the viewpoint of **Member States**: in the **UK**, where 40% of the respondents were involved in collective actions with a cross-border element, stakeholders were divided. Half found the procedure in compensatory cases somewhat difficult to very difficult, and the other 50% rated the procedure as not difficult at all. Among those finding difficulties, a respondent identified some specific problems with the conduct of cross-border collective actions. These included the extra effort and additional costs entailed in identifying class members who may not be resident in the jurisdiction as well as the risk of inconsistent judgments arising out of parallel proceedings. A law firm representing defendants mentioned the same issue, and felt more legislation was needed on cross-border issues since, in their opinion, the Brussels Recast Regulation did not provide sufficient certainty. The same law firm identified as well a problem relating to the “the difference between opt-in for foreign claimants and opt-out for domestic claimants, (which) causes problems in the procedures to be used”. In **Germany**, problems arose regarding proof of standing of foreign claimants (see already above). In the **Netherlands**, 75% of the respondents highlighted problems regarding questions of applicable law and jurisdiction.

In Member States where collective redress cases have so far been domestic, some respondents nonetheless expressed general concern over the difficulty of cross-border cases, such as in **Italy** (57% of respondents), or raised potential issues regarding standing of foreign claimants (**Slovakia**), and enforcement (**Hungary**).

### Problems reported concerning cross-border cases

Austria	Belgium	Bulgaria	Croatia	Cyprus	Czech Republic	Denmark	Estonia	Finland	France	Germany	Greece	Hungary	Ireland	Italy	Latvia	Lithuania	Luxembourg	Malta	Netherlands	Poland	Portugal	Romania	Slovakia	Slovenia	Spain	Sweden	UK	Number of countries
							•			•		•		•					•			•	•		•		•	9

## 7. Cost Risks

The empirical data evidences that in some cases, costs can deter the pursuance of collective claims. The following table shows countries where the majority of respondents express concerns as to the costs of proceedings. These costs may include (but are not limited to) court fees, lawyers’ fees, an unspecified type of cost, or a mixture of these options.

Austria		
Belgium	•	
Bulgaria	•	
Croatia		
Cyprus		
Czech Republic	•	
Denmark	•	
Estonia		
Finland	•	
France		
Germany		
Greece		
Hungary		
Ireland		
Italy	•	
Latvia	•	
Lithuania	•	
Luxembourg	•	
Malta		
Netherlands		
Poland		
Portugal		
Romania		
Slovakia	•	
Slovenia		
Spain		
Sweden		
UK		
		Number of countries
		10

For some countries such as Bulgaria, Latvia and Italy, the cost of proceedings was one of the top 3 reasons for not pursuing a claim via a collective procedure. The following subsections below explore aspects of costs in further detail.

### 7.1 Loser Pays Principle

In the EU Member States, the loser pays principle generally applies. However, in some jurisdictions, the principle is attenuated where the winning party culpably caused unnecessary costs (e.g. Austria) or where the court finds that the costs are excessive considering the length and complexity of the case (eg Bulgaria). In the UK, the loser pays principle applies but with flexibility of the court in making a different order (e.g. if the party was partly successful, the conduct of one or the other party was unreasonable or an offer to settle was rejected, similarly to Poland). However, in GLO cases, courts have applied cost caps to the recoverable amount of the winning party. In Finland, legal costs are distributed between the consumer ombudsman who brings a collective claim and the defendant. In collective settlement proceedings in the Netherlands, each party normally bears their costs, except where the court decides that the costs are to be paid by one or more of the petitioners. In the new Slovenian draft legislation, court fees depend on the value of the claim but the latter is set at 20% of the full amount of the individual claims or at 20 % of the aggregate amount of damages.

Respondents to the empirical study also had to comment on the question whether the loser pays principle had a deterrent or stimulative effect on their choice to bring a collective claim.

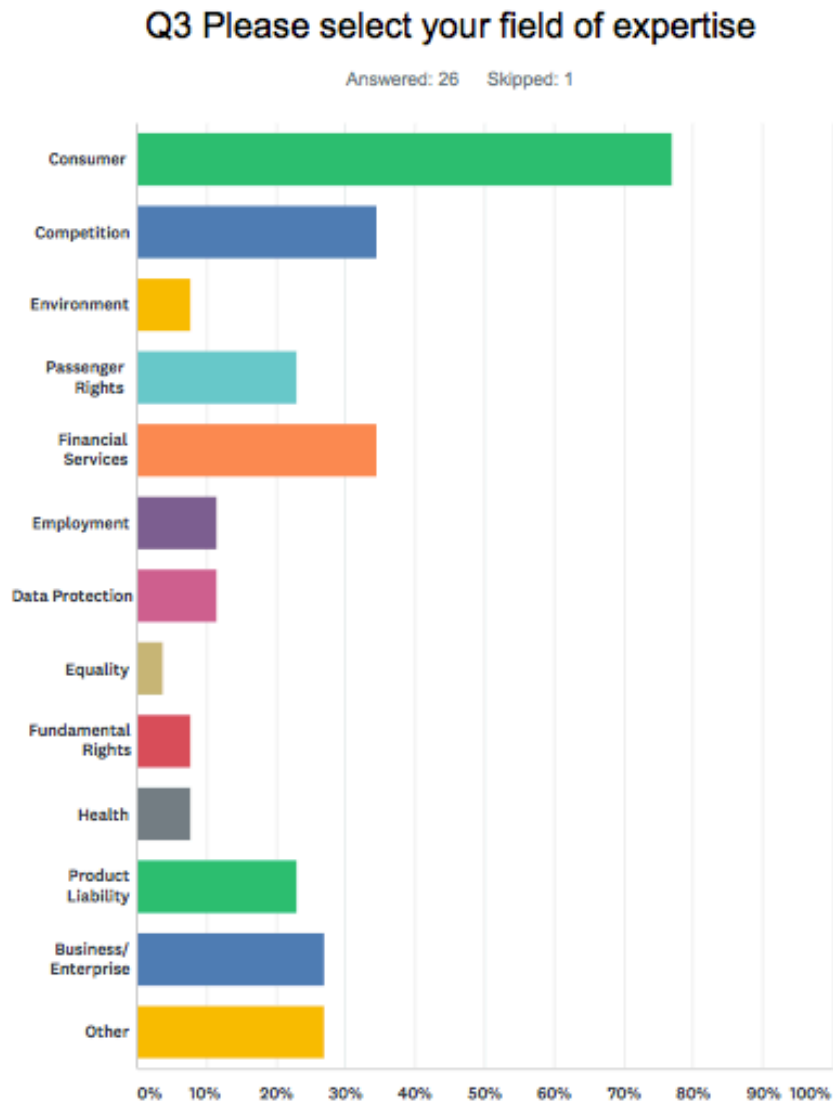
Stakeholders in 14 Member States were of the view that the **'loser pays' principle is not a deterrent**. Those expressing this view were mainly undertaking claimant or claimant related work.

In Member States where costs are not fully recovered irrespective of the outcome of the claim, the deterrence effect of the loser pays principle is reduced. This approach to costs has also led stakeholders in **France** to take the view that the deterrence of the principle in that jurisdiction remains a theoretical possibility rather than a certainty in practice and the achievement of genuine deterrence depends on court practice. Interviewee comments from the **Netherlands** highlight that a loser in litigation pays modest sums in case of a loss (for example, € 50,000 would be considered very high). In one Dutch defendant's experience, the losing party is usually ordered to pay only the fixed costs of the winning party and these fixed costs do not represent, and are usually much less, than the actual costs.

Similarly, some defendant and claimant stakeholders in the **UK** and **Malta** take the view that the ability of the courts to reduce the costs if the loser is a consumer association undermines the strength of any deterrence. A similar predisposition to a general discretionary power of the court to reduce costs is shown by some stakeholders with claimant work experience in **Croatia**, the **UK** and **Germany**. In **Hungary**, a public prosecutor or a person or body authorized by specific legislation does not bear the burden for any costs as costs are not born by such parties but by the State.

29 stakeholders (mainly those undertaking claimant or claimant related work) held the view that the **'loser pays' principle is a deterrent**. Of these 7 were lawyers undertaking claimant work, 6 were organisations representing claimants or potential claimants, 6 were lawyers with both defendant and claimant work experience, 2 were public authorities representing claimants, one was a lawyer with experience of defendant work, 2 were judges and 8 were undefined legal practitioners etc.

The following is a breakdown of these respondents by field of expertise:





The qualitative data demonstrate that, whilst there is deterrence, the degree of deterrence varies according to each Member State's approach to costs including whether the costs are attenuated according to type of stakeholder or not charged all.

A claimant organisation from the **Czech Republic** expressed the view that collective actions are not brought because of the potential liability for costs. In their view, collective claims typically concern disputes between citizens and corporations characterized by an imbalance of power and resources and a collective claim is usually an option of last resort in cases where public authorities fail to enforce the law. In such instances, the loser pays principle then simply increases the already very high risk facing the plaintiff(s).

A similar absolute deterrence effect is evidenced in **Hungary** where one consumer organisation expressed the view that claims are only brought when success is highly probable. However, the strength of this deterrence is to be considered slightly limited, as consumer organisations in Hungary are exempted from paying court fees generally and so liability is limited.

In **Denmark**, 2 out of 3 respondents were of the view that the loser pays principle is a deterrent to the bringing of a collective claim. For the respondent with both defendant and claimant work experience, this is "due to the high costs involved" which "can be overwhelming to the defendant when facing a choice to fight a claim." However, this impact is not universal across all sectors. One stakeholder with experience of defendant work commented that in public law related cases, the costs of the case is manageable due to the availability of legal aid for such cases and therefore there is no deterrent effect. Similarly, for the **Finnish** Competition and Consumer Authority, collective redress is not appropriate to solve a dispute in the consumer/competition sector, in particular because of the length and costs of the proceedings

On the other end of the spectrum, the absence of exemptions to costs has deterred consumer organisations and other NGOs in **Latvia** and may do so in **Luxembourg** should a general collective mechanism be introduced. In the latter jurisdiction, the current situation makes it difficult for claimants to go to court, "so if a collective redress mechanism was introduced, the costs of such procedure would be a problem." For 2 lawyers with claimant work experience and 2 academics in **Italy**, the exercise of discretion of the court towards the recovery of costs deters the bringing of a collective claim.

One apparent relationship from the empirical data is that 24% of respondents who considered the loser pays principle as a deterrent also cited the absence of funding as the predominant reason for not commencing collective claims (See Subsection 5 for further analysis of Funding). Additionally, it is to be noted that for some countries, such as **Ireland, Greece and Lithuania**, the respondents are evenly divided as to the deterrent effect of the loser pays principle. In **Luxembourg**, the loser pays principle is not available. But, a successful party may recover a procedural indemnity from the losing party, the amount being determined by the judge.

85 respondents commented on the question whether the 'loser pays' principle had a stimulative effect. 39% of these commented that the principle was a stimulator for commencing mass claims with 60% answering in the negative.

Of the respondents who stated that the loser pays principle **is not** a deterrent, 13 stakeholders simultaneously indicated that it was stimulator of collective claims and 20 was of the view that it was not. The majority of the former were stakeholders with experience of claimant work or were claimants themselves.

As for the rationale behind the majority choice that the loser pays principle is **not** a stimulant, the data provides no clear common reason for the stakeholders' choice. A limited insight may be gained from Spain where a lawyer representing defendants highlight that "people do not really consider the recovery of costs. They never receive 100% back and it is always necessary to expend in excess of recoverable costs in order to succeed in a claim."

Respondents who highlight a stimulative effect cite the factors highlighted regarding the non-deterrence of the principle as reasons for their choice. In **Italy** and the **UK**, 4 claimant or stakeholders with claimant work experience were of the view that court discretion over who pays and the amount of costs awarded was a stimulator rather than a deterrent to bringing collective claims. In the UK, one respondent commented that bringing a collective rather than individual actions could be a mechanism of individual claimants spreading such risk and therefore act as an incentive for collective litigation. In **Belgium**, the loser pays principle applies to collective actions as it does to other civil proceedings. For two lawyers with claimant work experience, the recovery of costs on this basis was an incentive to bringing litigation.

## **7.2. Court Fees**

The respondents also reflected on the question whether the amount of **court fees** to be paid for collective proceedings is a deterrent to the bringing of a collective claim. 34 % of the 62 respondents answering this question replied in the affirmative. 66 % did not find that court fees are any hindrance to bringing a claim collectively.

The data show that the predominant type of stakeholder who answered yes and no were lawyers representing claimants (11 and 18 respectively) and those in the consumer sector. However, compared to those who selected yes, a greater proportion of lawyers representing defendants and lawyers representing both defendants and lawyers were of the view that court fees do not deter the bringing of collective claims. As for the predominant policy areas, some commonality exists. Stakeholders in the consumer, competition and financial services sector were the majority to hold the view that court fees were not a deterrent and the majority of stakeholders who selected 'yes' were in the consumer, product liability and competition sectors.

### *Court Fees not a deterrent*

The qualitative data from the majority who answered in the negative show that court fees are either waived, reduced, capped depending upon the claim or generally low. The data trend demonstrates that this seems to be particularly the case for claimants in the consumer sector, particularly consumer associations. In **Hungary**, consumers associations are funded by the government and are exempted from court fees. Similarly, court fees were waived in **Malta** in the consumer organisation's claim. In **Greece** and

**Poland**, legal practitioners representing claimants in the consumer sector highlighted that court fees are very low with an average court fee of between € 600-1000 in **Greece**. Similar viewpoints have been expressed by respondents from **Netherlands** and **Estonia**. In **Lithuania**, lawyers representing claimants comment that court fees are dependent upon the claim but are generally capped to a max of €1200. In **Romania**, a judge in the competition and financial services sector identified that no court fees are charged.

### *Court Fees a deterrent*

The qualitative data from those who answered in the affirmative show that lawyers representing claimants, consumer associations and public authorities in some jurisdictions share concerns about court fees. In **Luxembourg**, a consumer association was concerned as to the potential difficulty of facing court costs, should a compensatory collective redress mechanism be implemented. In Hungary, a public authority representing claimants highlights that NGOs are not sure whether to start **cases** because of the court fees and the financial risks involved on their side.

In Finland, one member of the judiciary was concerned about the impact of court costs on actions involving the Ombudsman.

In collective compensatory claims, court fees are a particular issue for 62% of the respondents from **Bulgaria**. One of them points out that high costs are one of the reasons why "class actions had a difficult start in Bulgaria". Class actions do not benefit from any exemptions regarding court fees, which are thus calculated following the general rule: court fees in Bulgaria are calculated at a flat rate of 4% of the value claimed. Consequently, as highlighted by two lawyers representing claimant and defendant stakeholders, respondents in a collective redress case where all the compensation claims are grouped, can be subjected to a high amount of court fees. A public authority stakeholder which represents claimants thinks consumer claims should be exonerated from fees in light of this flat rate approach.

Notwithstanding the views expressed above, the overall data from **Luxembourg** and **Hungary** show a majority of the respondents taking the view that court fees are not a deterrent. In **Finland**, the number of respondents was evenly balanced in their choice of yes/no. However, in Bulgaria, the majority of respondents showed a strong concern about the impact of court fees.

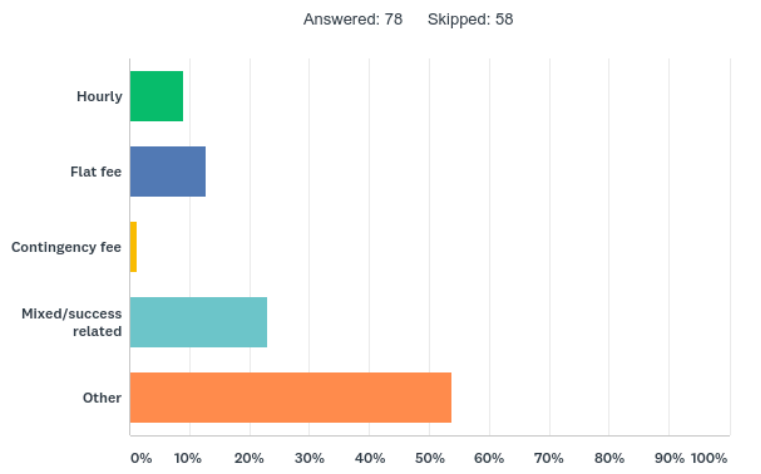
### **7.3. Lawyers' Fees**

Fees structures vary across the EU. They are either **fixed** in statutes or can be **agreed** upon between a party and their lawyer (e.g. **Cyprus, Latvia**). Although **contingency fees** are prohibited in many countries (e.g. **France, Ireland, Denmark, Portugal**), some countries explicitly allow them (e.g. **Estonia, Latvia, Finland, Hungary, Greece, Poland**) or allow them with conditions (e.g. **Czech Republic**, as long as they do not exceed 25% of the value of the claim).

Several countries allow **success based fees** to a certain extent. How fee arrangements are made varies considerably. To name a few examples: In **Austria**, contingency fees are not permitted while performance based fees are admitted (e.g. agreement on a certain fixed amount in case of a successful claim is permitted, if there is also a fixed sum in case of unsuccessful litigation and no gross disproportionality between the sums). In **Belgium**, reasonable and proportionate success fees can be agreed, but agreements where lawyers' fees depend solely on the outcome of the case are prohibited. In **Bulgaria**, conditional fee arrangements are permitted except for nonpecuniary cases. In **Italy**, lawyers and clients can conclude fee arrangements under which fees are based on a percentage of the compensation award. The new **Slovenian** draft legislation allows for a limited form of contingency fees: Lawyers can obtain up to 15 % of the final judgment value or up to 30% if the lawyer accepts the risks of proceedings. In **Sweden**, risk arrangements in which the lawyer receives more compensation if successful are subject to court approval. In the **UK**, contingency fees are allowed subject to a cap of 50% of recoveries.

The respondents to the empirical study confirmed the diversity of the fees structures and that there is a variety of different types of fees arrangements with US style contingency fees being the exception.

#### Q36 How are lawyers' fees paid in collective actions?



The data indicate that the majority of fee structures in the "Other Category" involve a hybrid combination of the first three forms of schemes. The common structures evolve around the use of a flat/hourly fee + scheme, e.g. flat fee + success related fee. The majority of the schemes highlighted in this category include a mix of the flat and hourly fee scheme. The data show that respondents who are either claimants or undertaking claimant work e.g. lawyers, predominantly use flat fees, flat fee+ arrangements. Conversely, those who are defendants predominantly use hourly fees or a hybrid scheme. Open comments do not provide a clear answer for the basis of this difference.

The qualitative data indicate that, in some cases, methods of calculating lawyer's fees can disproportionately favour some stakeholders. In **Croatia**, a concern was expressed that claimant lawyers and their clients can be advantaged by the lawyers' fees system. A stakeholder undertaking defendant work opined that "tariffs are based on the value of the subject

matter of the dispute, and fees are according to Croatian bar association tariffs. This can cause a problem when the issue does not have a monetary value (e.g. the Franak case on contract terms). The parties will not easily agree on the value of the case and if no agreement is possible, the court/judge determines the value. In the Franak case, the judge determined a value of 50000 euros per bank, which is very low once translated to lawyers' fees especially as this case was then estimated at millions of euros. ...in this case this estimation really reduced financial risks for the representing consumer association."

Overall, the qualitative data demonstrate that, to a limited extent, an indication exists that a lawyer's remuneration and the method by which it is calculated creates some increased incentive to litigate. However, the data are not clear as to whether any incentive that is created (if any) is deemed to be unnecessary from the point of view of all of the parties.

### Problems reported with lawyers' fees

Austria	Belgium	Bulgaria	Croatia	Cyprus	Czech Republic	Denmark	Estonia	Finland	France	Germany	Greece	Hungary	Ireland	Italy	Latvia	Lithuania	Luxembourg	Malta	Netherlands	Poland	Portugal	Romania	Slovakia	Slovenia	Spain	Sweden	UK	Number of countries
			•											•														2

### 7.4. Contingency Fees

When asked whether the availability of contingency fees would affect the decision to bring collective actions 39 % of respondents replied in the affirmative, while 61 % stated that their decision-making process would not be affected by the availability of such fees.

The data show that the predominant type of stakeholder who answered yes and no to this question were lawyers representing claimants (7 and 14 respectively) particularly claimants in the consumer sector. However, compared to those who selected yes, a greater proportion of lawyers representing defendants were of the view that contingency fees did not affect a decision to bring a claim. As for the predominant policy areas, some mirroring exists. Stakeholders in the consumer and financial services sector commonly expressed a view on this question. Stakeholders who identified the availability of contingency fees as a factor affecting their decision to bring a collective claim, also identified that the availability of funding and cost of collective claims were also major concerns, ranking these third and second respectively.

In the **Czech Republic**, a lawyer representing claimants was of the view that contingency fees play an important role in funding cases which are characterised by a power imbalance between the parties. Two Czech respondents found contingency fees to be an important factor in deciding whether or not to bring a collective action. According to one respondent, it is

generally not perceived that their availability would lead to frivolous litigation. However, as no proper compensatory collective redress regime exists, respondents could not comment from a practice perspective. In **Bulgaria**, a member of the judiciary was of the view that contingency fees will always have an influence, but in their view, the fees used are not high in collective claims. In Ireland, the only participant who commented on lawyers' fees stated that it was common for lawyers to enter into contingency fee agreements with clients, although there was no specific indication that this would be something widely available in group claims. In **Italy**, 60% of respondents were of the view that the prohibition on contingency fees affected their decision as to whether or not to bring proceedings. It could be inferred that the Italian data that the number of collective actions would increase if full contingency fees were permitted although there is no evidence from the study to suggest that there would be significant numbers of lawyers willing to offer this type of arrangement.

The data demonstrate that several respondents noted that the unavailability of contingency fees would increase the necessity of alternative litigation funding schemes. However, one respondent warned that "incentive mechanisms are irreconcilable with the goal of effectively preventing abuse of forms of collective redress. This is because any type of incentive mechanism invariably serves (economic) third party interests (lawyers, experts, organisations etc.), making collective redress vulnerable to abuse."

Notwithstanding this potential, the empirical data do not provide evidence of any practical instances where unnecessary litigation occurred because of the availability of contingency fees. Additionally, where contingency fee agreements were available, stakeholder comments have not indicated that these agreements have inflamed any existing incentive to embark upon unnecessary litigation.

## 8. Information about collective actions

The existence of provisions on information about collective redress depends on the availability of collective proceedings or settlements in the respective Member State. Of the 76 respondents who answered the question on the availability of information, 61% were of the view that sufficient information is available that a collective redress mechanism exists in their country. However, 51% were of the view that information about ongoing proceedings were unavailable.

The following table shows countries where the majority of respondents identified either an absence of information about collective mechanisms and/or information about ongoing proceedings.

Austria	
Belgium	•
Bulgaria	•
Croatia	•
Cyprus	•
Czech Republic	•
Denmark	•
Estonia	•
Finland	
France	
Germany	
Greece	•
Hungary	•
Ireland	
Italy	•
Latvia	•
Lithuania	
Luxembourg	
Malta	•
Netherlands	
Poland	
Portugal	•
Romania	
Slovakia	•
Slovenia	
Spain	•
Sweden	
UK	
	<i>Number of countries</i>
	15

Of those who identified an absence of information about ongoing proceedings, the majority had experience as claimants or in claimant representative work.

In some jurisdictions, the absence of information is proving crucial. In **Spain, Hungary, Greece and Bulgaria**, those who had not brought or otherwise been involved in a collective action cited the lack of information about collective actions as being within the top 2 highest ranked common factors for their decision not to bring collective claims.

Where a mechanism is available in a Member State, there is usually a practice of publishing information, but there is no uniformity across Member States as to how information is to be given. In the main, information about collective redress procedures and ongoing cases are provided through the media, organisational websites managed by consumer organisations and court websites. In some compensatory cases, ongoing proceedings are normally publicised by order of the court at the outset of the case.

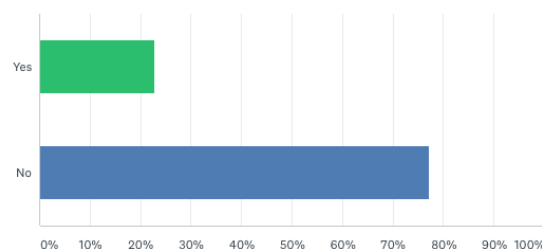
In **injunctive** cases, consumer associations and public authorities frequently provide information through their websites (see e.g. **Estonia, Greece**).

For **compensatory** claims, a variety of channels are used to distribute information (e.g. in **Austria**, associations bringing Austrian style group actions publish information on pending mass litigation on homepages or in newspapers. In **Bulgaria**, an announcement is made on the website of the Commission for Consumer Protection, information is given through the media, and an announcement is made at the defendant's premises. In **Denmark**, the court decides how information about a class action is to be given (usually notification via public announcement by the class representative and a summary of pending actions is made available on the Court Administration's website, similarly in **Lithuania**). In **Hungary**, the court decides on the format of information distribution, usually through mass media. In the **Netherlands** information about WCAM cases is given via various channels, e.g. in newspapers, on websites, via individual letters, and bailiff notifications. In the **UK**, there is a GLO list and the CAT publishes applications for competition CPOs on their website.

Despite the above, the data show that, to some extent, consumers in particular are not being adequately informed about available collective procedures.

Are consumers sufficiently informed about available collective redress procedures?

Answered: 22 Skipped: 114



For one claimant type stakeholder in **Croatia**, the level of information available to consumers is entirely dependent upon the ability of the party managing such information and media coverage. Due to this reliance on third parties for information, the empirical data from some jurisdictions such as **Greece** and **Denmark** also evidences a concern from stakeholders regarding the currency and rather general scope of information which may be available in media, particularly those on the internet. Accordingly, as one respondent from **Bulgaria** puts it, the need for other official sources of information to educate the general public about collective redress mechanisms is present.

Some respondents have made suggestions to improve the provision of information. In **Hungary**, one stakeholder recommended that following an injunction, the obligation should be passed onto infringing entities to publish the court’s decision in a newspaper and on their website. Additionally, potentially affected consumers could benefit from a more “targeted” approach, so as to be informed of the possibility to be compensated. One respondent argues that “if companies had to notify all concerned consumers, that would probably overburden them, but it would help”.

In the main, official national registries containing information about collective procedures are rare. In **Portugal**, one stakeholder comments that the absence of a national registry of collective claims may be due to the very small number of collective claims. However, recent legislative initiatives in **Slovenia** and **Poland** have seen the establishment of a registry.

## 9. Specifics of Injunctive Relief

### a. Collective injunctive procedures

Respondents to the empirical study have been asked which factors mostly influence their decision to gain injunctive collective redress. It has to be noted that the term “injunctive relief” refers to injunctions across all areas of law and is not limited to the area of consumer protection. Furthermore, the term “injunctive relief” is not necessarily understood in the same way by the respondents (it can comprise both an interim order or definite measure establishing a breach of the law or prohibiting an illegal practice).

Factors influencing the decision to request injunctive relief have been reported as follows:

<b>Factors</b>	<b>Responses</b>
Speed of proceedings	20.59% 7
Costs	32.35% 11
Support for enforcement	14.71% 5
Availability of compensation	8.82% 3



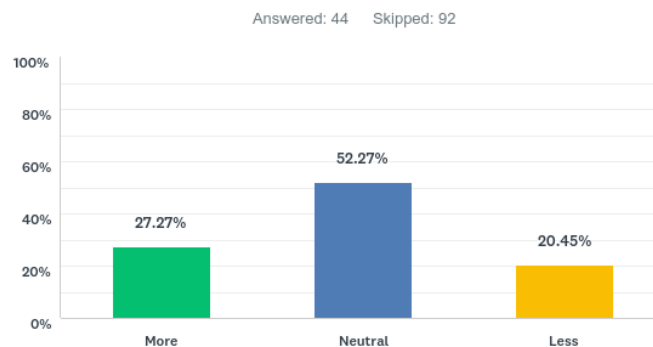
Bargaining power/ likelihood of success	23.53% 8
Efficiency of injunction	23.53% 8
Other	32.35% 11

Overall, procedures for injunctive orders have been reported as being rather clearly set out. In many cases, general provisions of civil procedure apply to injunctive orders (e.g. **Austria, Germany**). Some jurisdiction explicitly provide for **expedient** procedures (e.g. **Belgium, Croatia** for anti-discrimination cases, Greece, Poland) or allow for interim measures (e.g. **Latvia, Finland, Malta, Slovenia, Spain** etc.). As to the **enforcement** of injunctive orders, many jurisdictions provide that the court can impose fines in case of non-compliance (e.g. **Belgium, Bulgaria, Croatia, Cyprus, UK** (both also contempt of court), **Denmark, Estonia, Finland, Germany, Greece, Italy**).

### b. Difficulties with injunctive relief

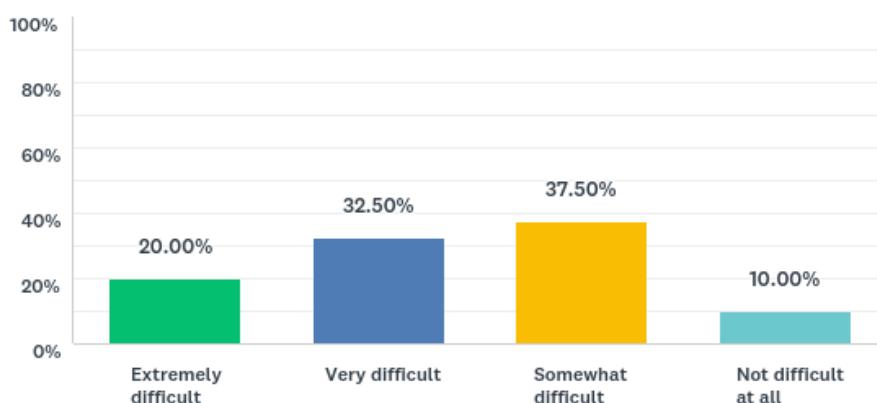
In practice, respondents reported difficulties with injunctive orders. 53% of those commenting on this issue found it very to extremely difficult, 38 % somewhat difficult, and only 10 % not difficult at all to gain an injunctive order.

Q66 Compared to non-representative, non-collective action, what burden does collective injunctive redress have on courts?



## Q13 How difficult have you found gaining injunctive order?

Answered: 40 Skipped: 96



Whilst many stakeholders did not find it difficult as such to gain an injunction, or at least less complicated than gaining compensatory redress, **various problems** were reported: respondents commented that injunctions were rarely used due to lengthy and costly procedures, high thresholds for injunctive relief to be successfully granted, a lack of clarity on conditions for standing and lack of funding. As consumer associations have limited access to funding for claims, they can be prevented from bringing them, especially where cases are complicated, e.g. where technical experts may be required. A stakeholder from **Greece** reported that the standard for a claim to be admitted is too high. Stakeholders in **Cyprus** highlighted that shortcomings of legislation regarding collective claims leaves too much room for companies to exert their power. Stakeholders from **Spain, Hungary and Slovenia** noted that their systems lacked a corresponding mechanism providing for compensation to affected consumers, who could reach compensation only by filing individual law suits. In the **Czech Republic**, a combination of practical and substantive issues were highlighted. A plaintiff is required to specify very precisely which behaviour the defendant should cease and it was reported that a defendant was able to simply change the details of an unfair commercial practice to circumvent the claim. It was also reported that court proceedings were very slow (more than 2 or 3 years) and that it is difficult for NGOs in practice to succeed in injunctive cases against a big company represented by the best attorneys. It was also stated that the judges have a large discretion as to what the appropriate measures in the relevant case should be.

In **Bulgaria**, the injunctive procedure was described as burdensome. One Bulgarian stakeholder commented that "the threshold for the grant of an injunctive order is rather high, given the large degree of discretion left to the judges as to what the appropriate measures in a given case are". Several cases were brought by associations, mainly in 2014-2015, with only two of them completed so far.

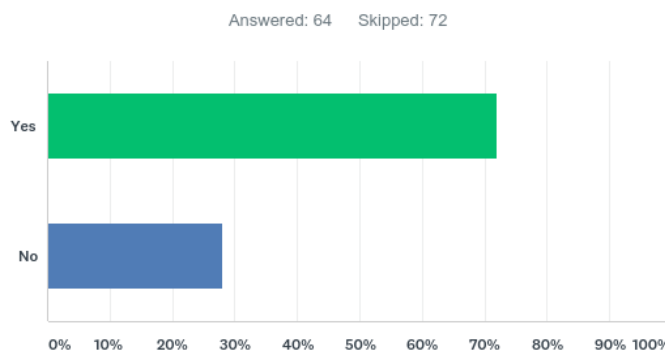
Furthermore, the complaint was made that, even if an injunction is entirely in favour of the association, the judgment cannot be satisfactorily implemented

due to a lack of an effective enforcement mechanism under the Injunctions Directive 2009/22/EC.

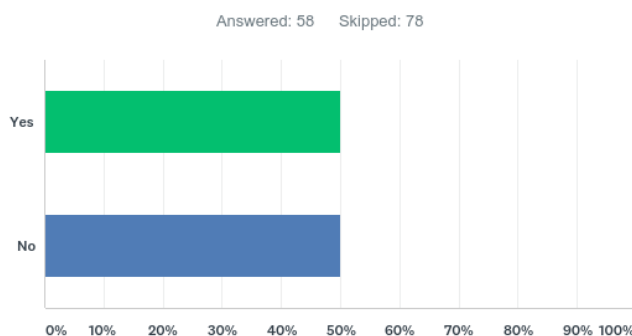
### c. Injunctions and compensatory redress

There can be an interplay between injunctive and compensatory relief, if a legal system provides for both types of redress in the relevant sector. This is not always the case. Some jurisdictions have no compensatory collective redress (see above, e.g. **Cyprus, Estonia**) and others, while in principle permitting proceedings for both injunctive and compensatory relief in one action, do not necessarily provide for collective injunctive and compensatory relief in the same sector (e.g. **Austria, Germany**). An injunction is normally not a precondition for compensatory redress but can have an impact on subsequent individual proceedings (in the majority of Member States) or collective proceedings (see eg. Bulgaria, Denmark, Finland, Lithuania, Poland, Sweden).

Q48 Is it possible to rely on an injunction order in a subsequent individual action damages?

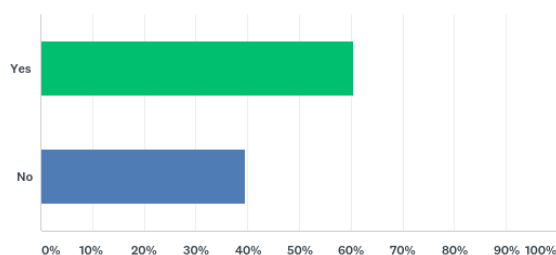


Q49 Is it possible to rely on an injunction order in a subsequent collective action for damages?



When asked whether injunctive and compensatory redress can be claimed in a single action (as e.g. permitted in **Belgium, Bulgaria, Denmark, Finland, Lithuania, Malta**), 61 % of the respondents to that question confirmed this, 39 % stated that this is not possible. It has to be highlighted again that respondents did not only refer to injunctions within the meaning of the Injunctions Directive.

Q47 Is it possible to seek an injunction and compensation within a single action?



### Possibility to claim injunctive and compensatory redress within a single action

Austria	
Belgium	•
Bulgaria	•
Croatia	
Cyprus	
Czech Republic	
Denmark	•
Estonia	
Finland	•
France	*
Germany	
Greece	•
Hungary	**
Ireland	
Italy	
Latvia	
Lithuania	•
Luxembourg	
Malta	•
Netherlands	***
Poland	•
Portugal	•
Romania	
Slovakia	
Slovenia	
Spain	•
Sweden	•
UK	•

\* Possible in the sectors of discrimination and environmental law

\*\* Possible in the sectors of consumer protection, competition, and financial services

\*\*\* Possible in SPV (special purpose vehicle) proceedings

#### d. Suggestions for improvement of injunctive procedures

Suggestions for improvement made by respondents comprise: mandatory conciliation procedures; increased information; improved conditions for standing; mandatory timelines to shorten procedures; expansion of injunctive relief across all sectors; procedural coordination with other pending lawsuits dealing with the same parties and interests; coordination of several collective actions started in parallel.

One respondent suggested the following: "The procedure must be considerably simplified, resulting in timely protection of the injured collective interest. Hearings are to be held only when it is necessary to gather evidence. When the court assesses the unfairness of clauses in the general conditions of the trader, the proceedings must be made only in writing. It is necessary ... that consumers can rely on a court decision which establishes the unfairness of the clauses, respectively of the practices, while not being bound by a court decision rejecting the claim. It is necessary to put in place a system of interim measures that effectively stops the violations during the process. It is necessary to provide for the preliminary enforceability of the first-instance decision not in force. There is no need in this type of proceedings to constitute a class of interested parties, therefore the disclosure of the claim should be dropped. In these proceedings it is necessary to bring an appeal only to the final act of the court (the decision) and to the definition of interim measures. Other acts should not be subject to appeal in order not to delay proceedings." When asked about which aspects of the collective injunctive



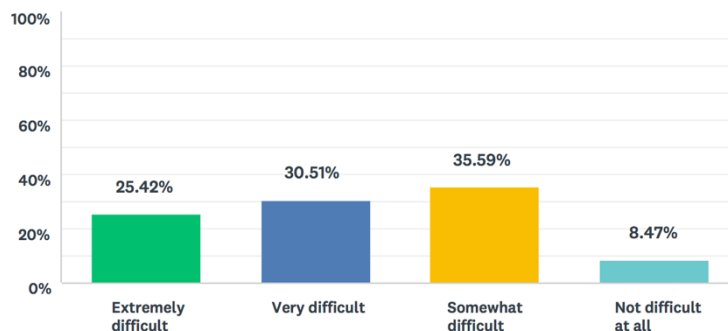
Support for the enforcement of judgments	8.00% 4
Availability of compensatory damages	14.00% 7
Increased bargaining power/ likelihood of success	32.00% 16
Efficiency of injunctive relief	12.00% 6
Greater efficiency of procedure	20.00% 10
Other	24.00% 12

### b. Difficulties with compensatory redress

When asked how **difficult** they found it to gain compensatory collective redress in mass claims, 33 respondents (56 %) of those replying to this question found it very to extremely difficult to gain compensatory collective redress. Thirty five per cent found it somewhat difficult while 8.5% did not find it difficult at all.

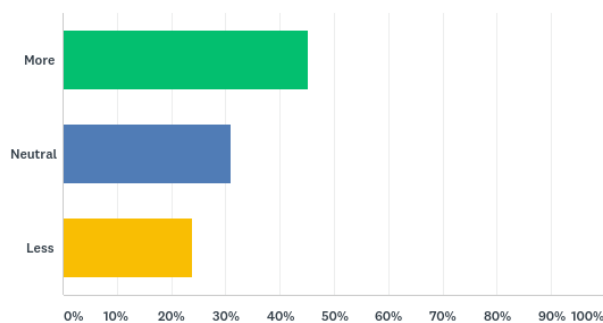
#### Q12 How difficult have you found gaining compensatory redress in mass claims?

Answered: 59 Skipped: 77



#### Q67 Compared to non-representative, non-collective action, what burden does collective compensatory redress have on the court?

Answered: 42 Skipped: 94



### c. Problems reported

Mostly, difficulties with compensatory collective redress stem from the absence of a compensatory collective redress regime.

Some respondents also reported practical difficulties with an existing compensatory regime, e.g. due to the absence of commonality of the claims; due to different levels of damages suffered by the claimants, which might jeopardize collective redress altogether; due to the high burden for establishing liability; and due to difficulties proving the amount of damages. These types of impediments were particularly identified in **Lithuania** and **Hungary**. In the latter, a compensatory claim is admissible if a group of affected consumers and the amount of damages are clearly identified. In **Poland**, an equilibrium in the quantum of damages each class member seeks in the action is required. This standardization requirement means that those who decide to opt in to the proceeding may sometimes need to modify their claims to make them equal with the others. Lawyers representing class members in Poland report that they frequently advise their clients to limit the claim to declaratory relief only, and then follow the injunction with individual compensatory claims.

Other practical deterrents such as length of time taken to resolve admissibility questions arise, e.g. in **Denmark**. In **Italy**, funding, evidentiary issues and court inefficiencies are common issues highlighted by respondents. As a consequence, Italian claimant respondents preferred to join related claims under the traditional civil procedure rules rather than through a collective compensatory procedure.

Other jurisdictions struggle with imperfect solutions or sectoral approaches, such as **Austria** or **Germany**. Non streamlined procedures which compare to normal first instance claims were considered inadequate by stakeholders in both countries. Evidence rules, the number of hearing dates etc. were considered to not be sufficiently adapted to the needs of mass claims.

Furthermore, cross-border elements are seen as additional burdens for trial initiation. It was stressed by a respondent from the **United Kingdom** that it is often difficult to sufficiently identify the claimants where events giving rise to the claim occurred in different jurisdictions. This could result in huge costs being incurred and the claim potentially being brought in the wrong jurisdiction. Also, the application of multiple national laws in cross-border scenarios can lead to difficulties. In the **Netherlands**, on the contrary, access to collective redress is relatively easy, even in cross-border cases. From there, it was rather reported that the Dutch rules could lead to a huge import of collective redress.

### d. Suggestions for improvement of compensatory procedures

A large number of comments from respondents suggested the introduction of opt-out actions, with some referring in particular to consumer claims. The change from an opt-in to an opt-out system would make proceedings simpler and quicker. It was also suggested to streamline the admissibility phase and to introduce fast track rules; to make conditions for standing more flexible, especially for ad hoc associations; to introduce a registry; to establish

mandatory time frames; to cap fees; to introduce a presumption of damages; to simplify evidence requirements. Furthermore it was stated that funding needs to be revisited which has become of huge practical importance; and that the position in the Recommendation (contingency fees not allowed) should be revisited. Sectoral collective redress regimes should be extended across sectors. It was also suggested that authorities should be able to directly order compensation; and that more emphasis should be placed on collective ADR, notably settlements. As to country specific comments, a **Lithuanian** lawyer suggested reducing the formalness of the procedure, introducing a presumption of damages and removing the requirement of evidence at the outset of proceedings. A **Cypriot** respondent suggested the use of industry specific ombudsman services where possible as a way of cutting down on the need for collective redress. A **German** respondent suggests the development of a general mechanism of declaratory test case proceedings: "one case goes to court, and all the other potential plaintiffs register and wait for the outcome of that "model" claim to then benefit from the outcome of the model case procedure. This reduces risk regarding costs because the outcome of the model case is known."

### Problems with compensatory collective redress

• Austria	Belgium	• Bulgaria	Croatia	Cyprus	Czech Republic	• Denmark	• Estonia	Finland	• France	Germany	Greece	Hungary	Ireland	• Italy	Latvia	• Lithuania	Luxembourg	Malta	• Netherlands	• Poland	Portugal	Romania	• Slovakia	Slovenia	• Spain	• Sweden	UK	Number of countries
•		•				•	•		•					•		•			•	•			•		•		12	

## 11. Punitive damages

**Punitive damages** are generally not available, with the exception of countries following the Common law system where they are very rarely used.

## 12. Instances of abusive litigation

More than three quarters of respondents did not report any instances of abusive litigation. The 14 respondents who referred to the risk of abusive litigation, however, pointed to potential risks rather than current instances of abuse.

One respondent referred to media reports about the initiation of potentially abusive litigation by fake consumer associations without being able to verify the information.

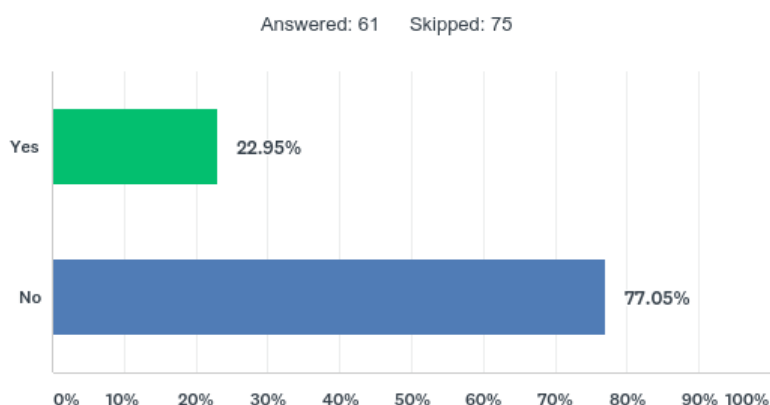
Another respondent stated that abusive litigation can occur where lawyers or third party funders see opportunities for themselves in organising and pursuing an action. The benefit to legal representatives would often be pursued through 'contingency fees'. The benefit to third party litigation



funders would operate on a similar basis. Controlling financial incentives would therefore also control the risk of potential abuses.

On the other hand, several respondents showed that the potential of collective actions to generate abusive litigation is rather limited and the situation in its whole incomparable to the US. One respondent commented that in the EU, "there is more of a risk of inadequate collective redress mechanisms and a lack of litigation than a risk of abusive litigation."

### Q46 Have there been instances of abusive litigation?



## 13. Stakeholder Specific Questions

Several of the questions in this section were answered by only a small subset of respondents, such that trends, where we identify them, can often only be described qualitatively, rather than quantitatively. For many respondents some of the questions were not relevant to their situation.

### a. Functioning of the Internal Market and Competition

Stakeholders were asked about the impact of collective redress on competitiveness, trade and investment strategies, and its administrative burden. The largest groups of respondents answering these questions were lawyers and law firms. The next largest groups of respondents were uncategorised and organisations / associations related to commerce and business. A much smaller group was that of defendants and potential defendants.

Around half of the respondents commenting on competitiveness reported an impact (11 out of 26); these respondents included most business associations (those of **UK, France, Germany and Poland**) and uncategorised respondents (specifically, a **Dutch** litigation funder, a **Polish** employers' organisation and two **Italian** academics). The respondents who did not report an impact were lawyers from **Italy, Ireland, Spain, Cyprus, Portugal, Latvia, Slovakia, Bulgaria, Czech Republic**, business associations from **Finland** and **Austria** as well as 2 defendants or potential defendants from the **UK** and the **Netherlands**.

The next question, on the impact of collective redress on trade and investment strategies, was largely answered in the same way by each respondent. The exceptions were the **Austrian** business association who this time did see an impact and a **Dutch** Litigation Funder, who this time did not confirm an impact.

Larger enterprises were more likely to report impact than smaller ones, e.g. a **French** business association, a **German** and a **Polish** business association and a litigation funder from the **Netherlands**; consumers were more likely to report positive changes (e.g. lower litigation costs) while businesses were more likely to be impacted negatively (e.g. increased legal costs). This effect on consumers versus businesses is also predicted by an administrative authority in **Luxembourg**.

One defendant or potential defendant from the **UK** explains, why these claims are increasingly expensive for defendants who often have no means to recover costs even when the claim is successfully defended. There is often no real method of cost recovery, as the claims are typically funded by claimant law firms or third party funders. They continue: "There is a low jurisdiction threshold to bring foreign defendants into the jurisdiction. There is a real risk of fraud in relation to the identity of claimants where claims arise outside of the United Kingdom. The cost of verifying the claimants' identity is often wholly disproportionate to the costs of the claim and the compensation sought. These claims are therefore highly susceptible to fraud where they involve foreign claimants. The claimants' lawyers ever increasingly expand the scope and number of claims as the litigation progresses which adds considerably to costs incurred and time spent."

In their comments, both businesses and consumers were receptive to collective actions, although many businesses stressed the need to effectively avoid frivolous actions and to not foster a litigious culture. Another respondent from the **UK** commented: "In a collective sense, all our member companies invest in the single market and need stability to drive investment decisions. Collective redress can dissuade foreign companies from investing in Europe, if it frequently encourages frivolous litigation. Nobody benefits from a litigation culture except lawyers. Numerous initiatives from the European Parliament and the Commission recognise this basic principle. Accountability, also a principle recognised institutionally, can be achieved far better by ADR and ODR. A stable and trustable climate for dispute resolution is required, which recognises the fundamental right of all consumers to access to courts, whilst also recognising that redress is about much more than a one-dimensional adversarial technology of going to court, and which does not encourage opportunistic litigation."

It was pointed out by a **German** business association that, in the USA, "liability costs" are found to be over twice as high as the EU average, according to one published study, a level that would surely impact trade and investment.

The **Finnish** business association pointed out that negative impact on the competitiveness of the markets can be avoided by careful design of the redress procedure (e.g. in their view: opt-in, proceedings only to be initiated by the Consumer Ombudsman).

Stakeholders were also asked about the impact of collective actions on companies' finances. While the majority of respondents thought there was no impact, it was the larger corporations that were more likely to report an impact. One lawyer representing defendants in **Spain** stated that legal insecurity was resulting in higher interest rates being charged on business loans.

## **b. Impact on Consumers**

A further question concerned the impact of collective redress on consumers. The majority of respondents answering these questions were consumer organisations, followed by lawyers and law firms representing either claimants or both claimants and defendants.

Because collective redress mechanisms are still absent in many Member States, many respondents had no evidence of any change and instead described the change that they would expect if collective redress were available to them. Respondents frequently answered "no", when they were unable to judge. E.g. it was pointed out by a respondent from France, that the impact of collective redress is difficult to evaluate at this early stage of its implementation because any cases that have been brought are often still pending.

Half of respondents (13 out of 26) said national collective redress legislation has an impact on consumers' ability to benefit from the internal market and international competition. These include three consumer organisations from **Greece, Croatia and Cyprus**, three lawyers from **Ireland, Italy and Slovakia**, two judges from **Bulgaria and Spain**, two academics from **Italy** and a public body from **Luxembourg**.

Most of the "no" answers were from 8 consumer organisations (**Malta, Spain, Slovakia, Luxembourg, Czech Republic (x2), Bulgaria and Hungary**).

One example concerning the impact on consumers' ability to benefit from the internal market is that in **Bulgaria** contracts between mobile network operators and their customers are seen to be fairer. A **Hungarian** Consumer Organisation observed generally improving consumer protection and confidence but pointed out the difficulty for the consumers in measuring the benefit.

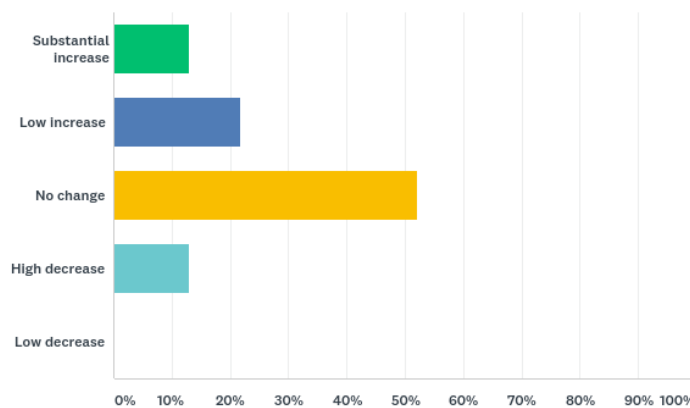
In general, respondents expect that businesses that can be targeted by collective redress are more likely to behave legally and responsibly, thus benefitting consumers. In **Croatia**, consumer redress is seen to have improved consumer confidence, particularly in banks. A **Spanish** consumer organisation emphasises the lack of trust in financial services due to there being no collective redress mechanism.

We asked about any impact on the price of goods and services caused by collective redress procedures. The answers given are summarised in the bar chart below. A **Bulgarian** consumer organisation stated that consumer unfriendly behaviour should be considered a cost to the consumer and thus even where nominal prices increase, this should be viewed as a net price decrease.

We asked whether consumers were sufficiently informed about available redress procedures and 17 out of 22 respondents said that this was not the case.

Overall, it was clear that from both the perspective of businesses and consumers, there exists a trade-off between the increased consumer confidence brought by collective actions and the potentially increased costs (of doing business and of goods and services).

Q63 How do collective redress mechanisms affect the prices consumers pay for goods and services within your jurisdiction?



### c. Public Authorities

Stakeholders were also asked whether they thought collective actions made it necessary to create new or reorganise existing public bodies. The question was mainly answered by public authorities followed by lawyers and respondents were split on the issue (9 in favour; 13 against). Justification for their position was not provided in the comments and we detected no trend.

## 14. Impact of collective actions on access to justice and fairness of proceedings

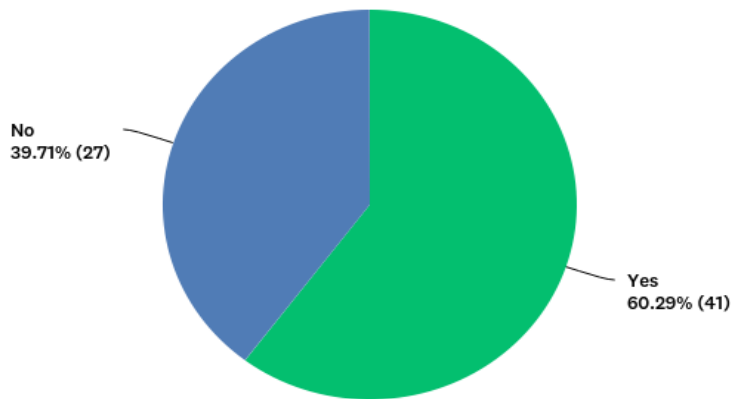
Respondents were also asked to comment on the impact of collective actions on access to justice and fairness of proceedings. These questions were mostly answered by lawyers. When asked about the burden caused by collective redress on the courts, respondents stated that the burden is largely unaffected by injunctive actions, but there was a clear trend for compensatory actions increasing court load. This was despite more claimants' cases being disposed of simultaneously, due to the cases tending to be more complicated.

When asked how the time to dispose of claims was impacted by collective actions the overwhelming stakeholder response was that collective actions are slower. Many respondents noted that collective actions are often lengthy and cumbersome. One respondent highlighted the problems of collective actions as opposed to collective settlements: "judicial class actions are slow,

ineffective, expensive, uncertain, can bring abuse, have no deterrent effect on business behaviour, and deliver poor outcomes for both consumers and businesses. This may help to explain the relative success of the Dutch mass collective settlement procedure (WCAM) under which nine large cases have been settled in the Netherlands.” A claimant's lawyer in **Belgium** said that collective proceedings, uniquely, involve three stages, increasing burden and slowing procedures. The **UK** Competition Appeal Tribunal raised the question as to who pays for collective claims and pointed out the danger of overcompensation. Another respondent deducted from recent cases that collective compensatory actions do not have a sufficiently high success rate to be considered as efficient procedural means. A **Bulgarian** lawyer expressed the opinion that there should be mandatory timeframes for disposing of collective actions.

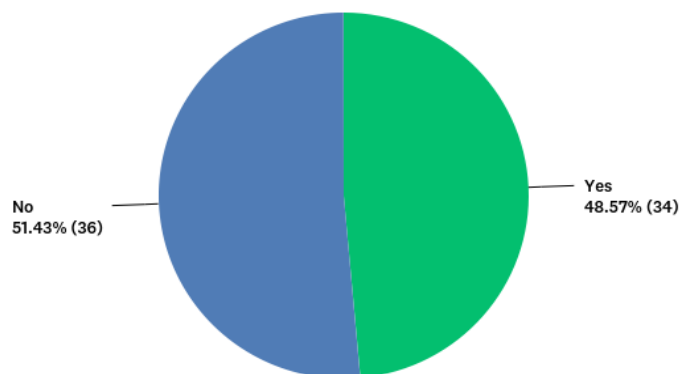
### Q52 Do collective actions ensure fairness of proceedings?

Answered: 68 Skipped: 68



### Q54 Are collective actions an effective method to obtain compensation?

Answered: 70 Skipped: 66



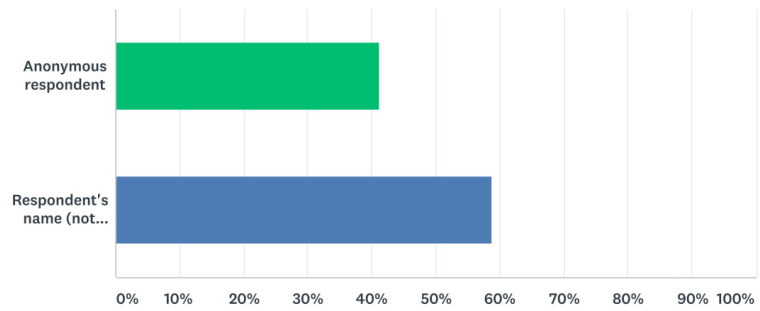


# SURVEY DATA

## COLLECTIVE REDRESS QUESTIONNAIRE

### Q1 Please indicate

Answered: 131 Skipped: 5

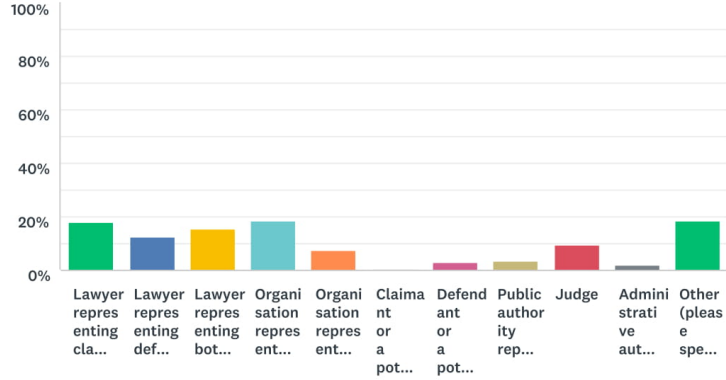


ANSWER CHOICES	RESPONSES	
Anonymous respondent	41.22%	54
Respondent's name (not compulsory)	58.78%	77
TOTAL		131

COLLECTIVE REDRESS QUESTIONNAIRE

Q2 Are you a:

Answered: 135 Skipped: 1



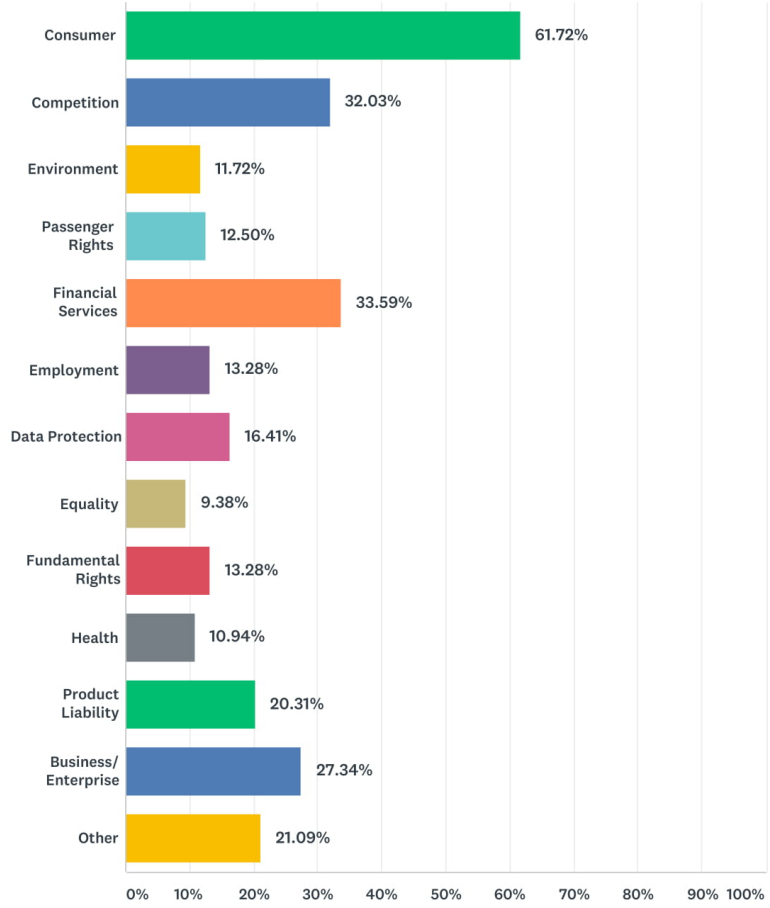
ANSWER CHOICES	RESPONSES	
Lawyer representing claimants	17.78%	24
Lawyer representing defendants	12.59%	17
Lawyer representing both defendants and claimants	15.56%	21
Organisation representing claimants or potentially representing claimants (e.g. NGO)	18.52%	25
Organisation representing defendants or potentially representing defendants (e.g. business association)	7.41%	10
Claimant or a potential claimant (e.g. SMEs and other business entities)	0.74%	1
Defendant or a potential defendant (e.g. SMEs and other business entities)	2.96%	4
Public authority representing claimants or potential claimants (e.g. ombudsman)	3.70%	5
Judge	9.63%	13
Administrative authority issuing injunctive orders	2.22%	3
Other (please specify)	18.52%	25
Total Respondents: 135		



COLLECTIVE REDRESS QUESTIONNAIRE

Q3 Please select your field of expertise

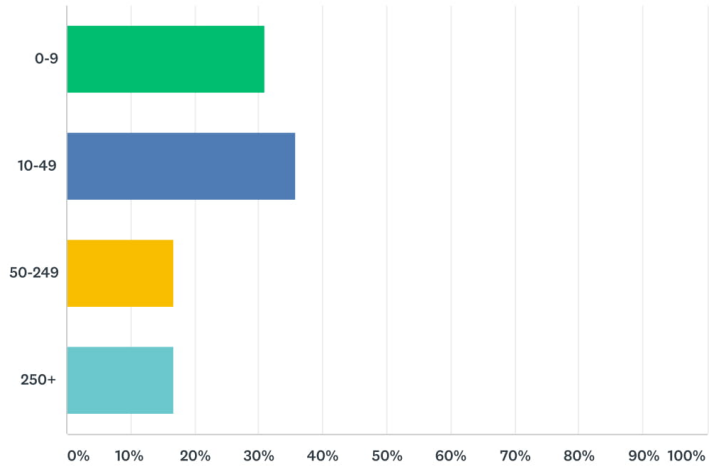
Answered: 128 Skipped: 8



COLLECTIVE REDRESS QUESTIONNAIRE

Q4 If you are an SME or business entity, what is the number of your  employees?

Answered: 42 Skipped: 94



ANSWER CHOICES	RESPONSES	
0-9	30.95%	13
10-49	35.71%	15
50-249	16.67%	7
250+	16.67%	7
TOTAL		42

COLLECTIVE REDRESS QUESTIONNAIRE

**Q5 In which EU Member State are you based (in case of companies please indicate primary place of business)**

Answered: 130 Skipped: 6

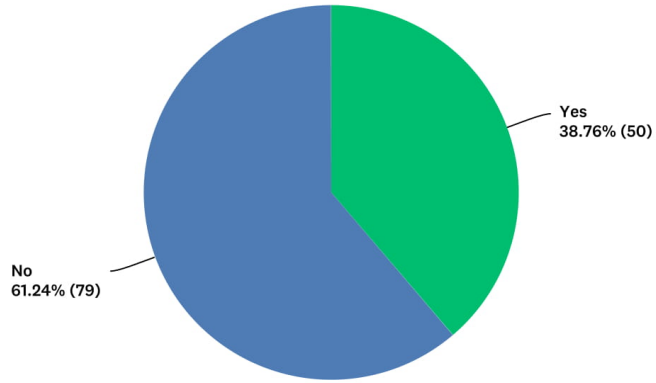
Individual answers, no graph available

5 / 75

COLLECTIVE REDRESS QUESTIONNAIRE

Q6 Have you been involved in collective redress (as claimant, claimant lawyer, other) or are you envisaging such involvement?

Answered: 129 Skipped: 7

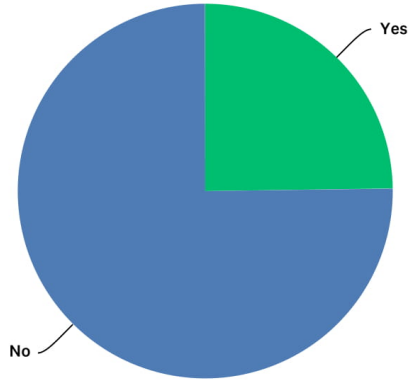


ANSWER CHOICES	RESPONSES	
Yes	38.76%	50
No	61.24%	79
TOTAL		129

COLLECTIVE REDRESS QUESTIONNAIRE

Q7 Have you defended a collective action/ been involved in collective redress (as defendant, defendant lawyer, other) or are you about to defend a collective action?

Answered: 121 Skipped: 15



ANSWER CHOICES	RESPONSES	
Yes	24.79%	30
No	75.21%	91
TOTAL		121

COLLECTIVE REDRESS QUESTIONNAIRE

Q8 If yes, please state in which jurisdiction claim(s) was/were commenced:

Answered: 61 Skipped: 75

Individual answers, no graph available

8 / 75

COLLECTIVE REDRESS QUESTIONNAIRE

Q9 If yes, please specify how many collective actions you brought/defended:

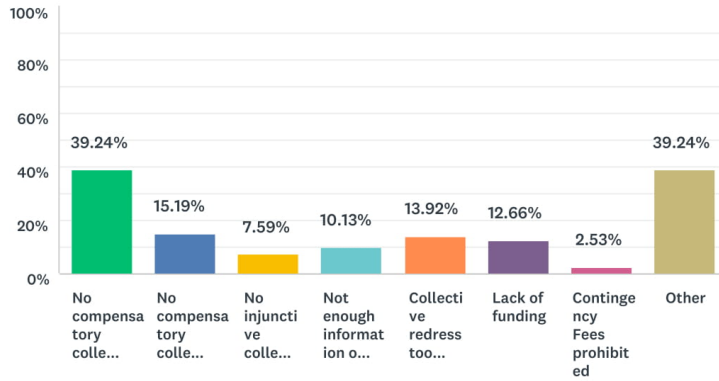
Answered: 55 Skipped: 81

ANSWER CHOICES	RESPONSES	
Injunctive collective action:	49.09%	27
Compensatory collective redress action:	69.09%	38
A combination of injunctive and compensatory collective action:	43.64%	24

COLLECTIVE REDRESS QUESTIONNAIRE

Q10 If no is applicable, please select the reason(s) for not seeking collective redress:

Answered: 79 Skipped: 57



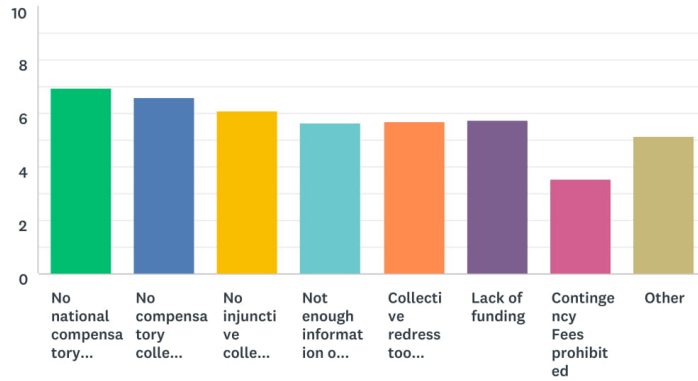
ANSWER CHOICES	RESPONSES	
No compensatory collective redress	39.24%	31
No compensatory collective redress for specific type of claim	15.19%	12
No injunctive collective redress for specific type of claim	7.59%	6
Not enough information on national mechanisms	10.13%	8
Collective redress too costly	13.92%	11
Lack of funding	12.66%	10
Contingency Fees prohibited	2.53%	2
Other	39.24%	31
Total Respondents: 79		



COLLECTIVE REDRESS QUESTIONNAIRE

Q11 With 1 being the predominant reason, please rank the reasons selected in question 5

Answered: 61 Skipped: 75

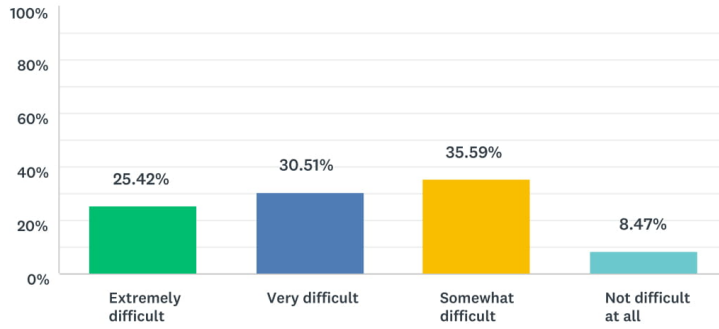


	1	2	3	4	5	6	7	8	TOTAL	SCORE
No national compensatory collective redress mechanism available	76.32% 29	2.63% 1	5.26% 2	2.63% 1	0.00% 0	2.63% 1	2.63% 1	7.89% 3	38	6.95
No compensatory collective redress mechanism available for specific type of claim	17.39% 4	56.52% 13	8.70% 2	4.35% 1	13.04% 3	0.00% 0	0.00% 0	0.00% 0	23	6.61
No injunctive collective action available for specific type of claim	15.38% 2	7.69% 1	53.85% 7	15.38% 2	7.69% 1	0.00% 0	0.00% 0	0.00% 0	13	6.08
Not enough information on national mechanisms	23.53% 4	17.65% 3	0.00% 0	35.29% 6	5.88% 1	17.65% 3	0.00% 0	0.00% 0	17	5.65
Collective redress too costly	15.79% 3	36.84% 7	5.26% 1	0.00% 0	31.58% 6	5.26% 1	5.26% 1	0.00% 0	19	5.68
Lack of funding	27.27% 6	22.73% 5	13.64% 3	9.09% 2	0.00% 0	22.73% 5	0.00% 0	4.55% 1	22	5.77
Contingency Fees prohibited	0.00% 0	15.38% 2	15.38% 2	0.00% 0	7.69% 1	7.69% 1	46.15% 6	7.69% 1	13	3.54
Other	50.00% 10	0.00% 0	5.00% 1	5.00% 1	5.00% 1	0.00% 0	5.00% 1	30.00% 6	20	5.15

COLLECTIVE REDRESS QUESTIONNAIRE

Q12 How difficult have you found gaining compensatory redress in mass claims?

Answered: 59 Skipped: 77



ANSWER CHOICES		RESPONSES	
Extremely difficult (1)		25.42%	15
Very difficult (2)		30.51%	18
Somewhat difficult (3)		35.59%	21
Not difficult at all (4)		8.47%	5
<b>TOTAL</b>			<b>59</b>

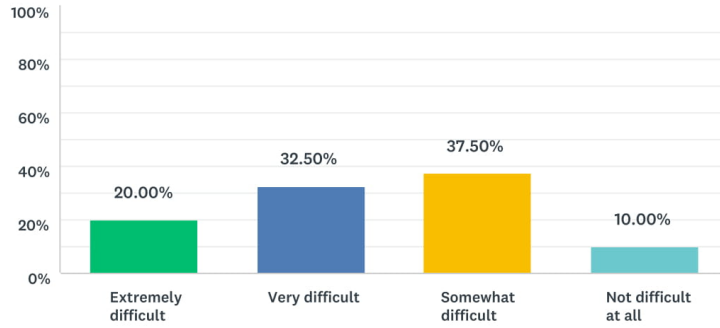
  

BASIC STATISTICS				
Minimum	Maximum	Median	Mean	Standard Deviation
1.00	4.00	2.00	2.27	0.94

COLLECTIVE REDRESS QUESTIONNAIRE

Q13 How difficult have you found gaining injunctive order?

Answered: 40 Skipped: 96

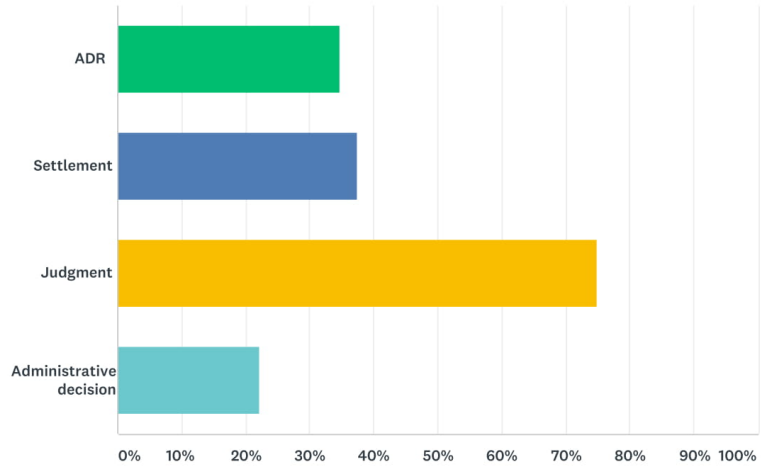


ANSWER CHOICES	RESPONSES	
Extremely difficult	20.00%	8
Very difficult	32.50%	13
Somewhat difficult	37.50%	15
Not difficult at all	10.00%	4
<b>TOTAL</b>		<b>40</b>

COLLECTIVE REDRESS QUESTIONNAIRE

Q14 What types of collective action mechanism have you had experience of?

Answered: 72 Skipped: 64

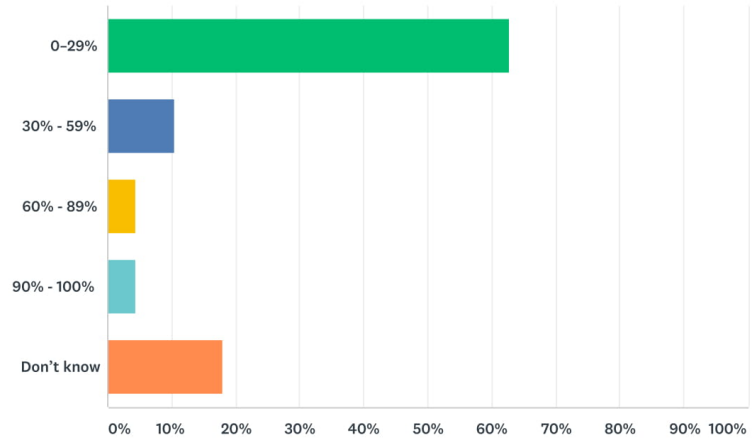


ANSWER CHOICES	RESPONSES	
ADR	34.72%	25
Settlement	37.50%	27
Judgment	75.00%	54
Administrative decision	22.22%	16
Total Respondents: 72		

COLLECTIVE REDRESS QUESTIONNAIRE

Q15 What percentage of collective actions with which you were involved were resolved by settlement?

Answered: 67 Skipped: 69

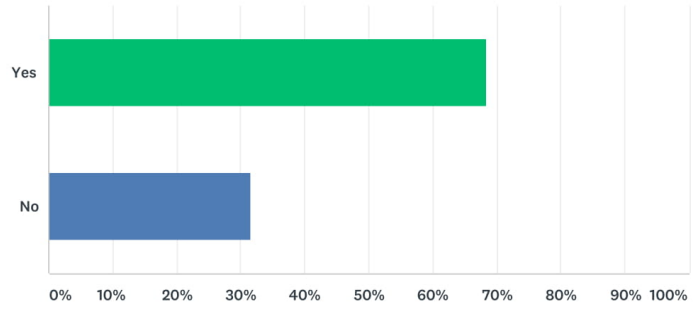


ANSWER CHOICES	RESPONSES	
0-29%	62.69%	42
30% - 59%	10.45%	7
60% - 89%	4.48%	3
90% - 100%	4.48%	3
Don't know	17.91%	12
TOTAL		67

COLLECTIVE REDRESS QUESTIONNAIRE

Q16 In case of settlement, have rights and interests of all parties been adequately protected?

Answered: 38 Skipped: 98

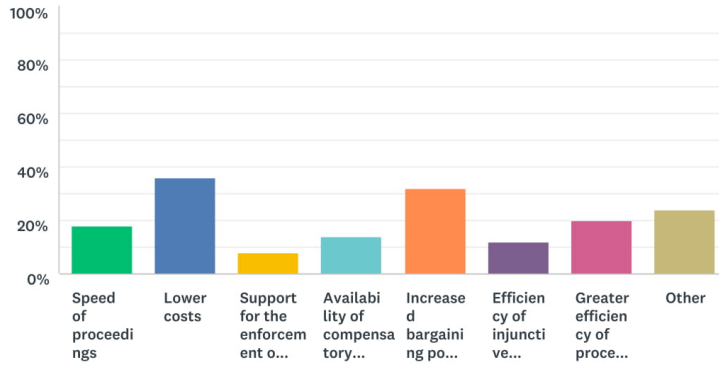


ANSWER CHOICES	RESPONSES	
Yes	68.42%	26
No	31.58%	12
TOTAL		38

COLLECTIVE REDRESS QUESTIONNAIRE

Q17 Which factor(s) influenced your decision to use collective procedures to gain compensation?

Answered: 50 Skipped: 86

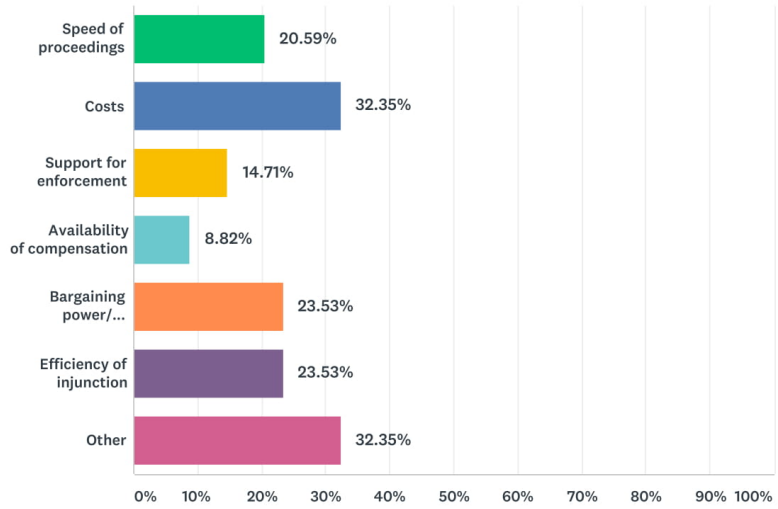


ANSWER CHOICES	RESPONSES	
Speed of proceedings	18.00%	9
Lower costs	36.00%	18
Support for the enforcement of judgements	8.00%	4
Availability of compensatory damages	14.00%	7
Increased bargaining power / likelihood of success	32.00%	16
Efficiency of injunctive relief	12.00%	6
Greater efficiency of procedure	20.00%	10
Other	24.00%	12
Total Respondents: 50		

COLLECTIVE REDRESS QUESTIONNAIRE

Q18 Which factor(s) influenced your decision to use collective procedures to gain an injunction?

Answered: 34 Skipped: 102



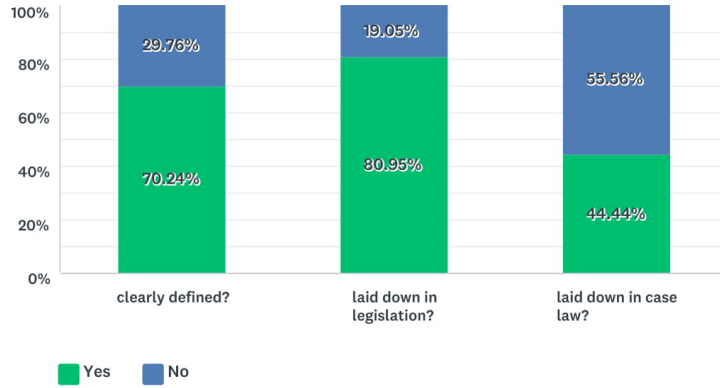
ANSWER CHOICES	RESPONSES	
Speed of proceedings	20.59%	7
Costs	32.35%	11
Support for enforcement	14.71%	5
Availability of compensation	8.82%	3
Bargaining power/ likelihood of success	23.53%	8
Efficiency of injunction	23.53%	8
Other	32.35%	11
Total Respondents: 34		



COLLECTIVE REDRESS QUESTIONNAIRE

Q19 Are conditions for standing to bring representative actions

Answered: 89 Skipped: 47

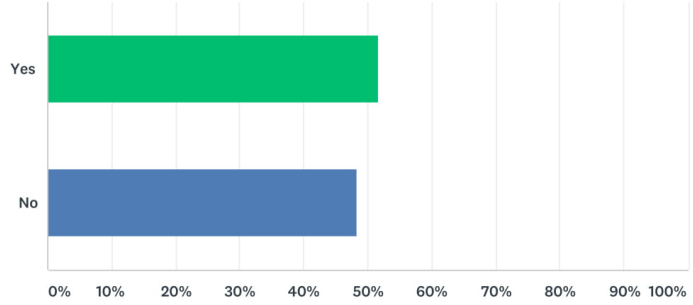


	YES	NO	TOTAL
clearly defined?	70.24% 59	29.76% 25	84
laid down in legislation?	80.95% 68	19.05% 16	84
laid down in case law?	44.44% 32	55.56% 40	72

COLLECTIVE REDRESS QUESTIONNAIRE

Q20 In your country, do representative entities have to be certified?

Answered: 85 Skipped: 51

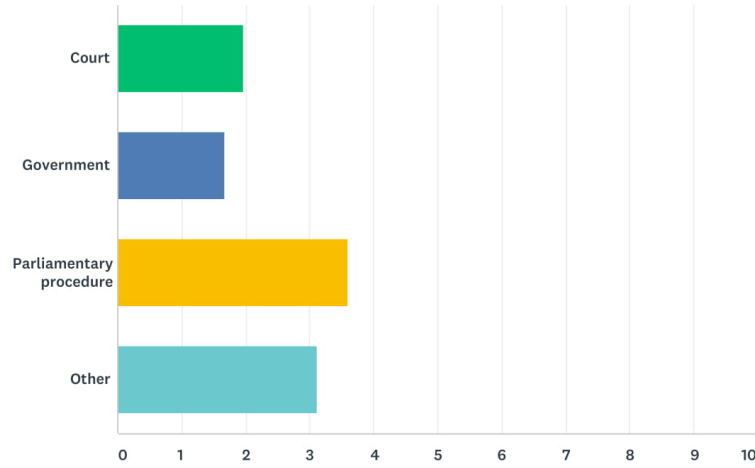


ANSWER CHOICES	RESPONSES	
Yes	51.76%	44
No	48.24%	41
TOTAL		85

COLLECTIVE REDRESS QUESTIONNAIRE

Q21 If yes, by:

Answered: 52 Skipped: 84

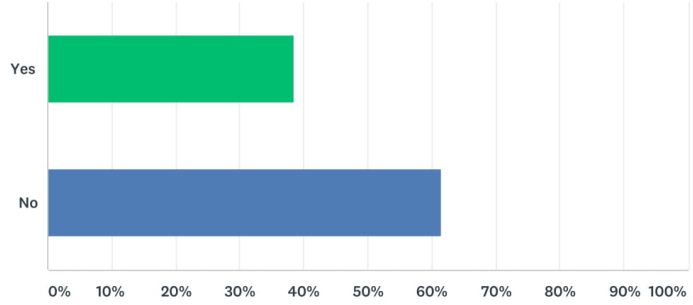


	YES	NO	TOTAL	WEIGHTED AVERAGE
Court	75.86% 22	24.14% 7	29	1.97
Government	83.33% 30	16.67% 6	36	1.67
Parliamentary procedure	35.00% 7	65.00% 13	20	3.60
Other	47.37% 9	52.63% 10	19	3.11

COLLECTIVE REDRESS QUESTIONNAIRE

Q22 In your country, can representative entities be designated ad hoc?

Answered: 78 Skipped: 58

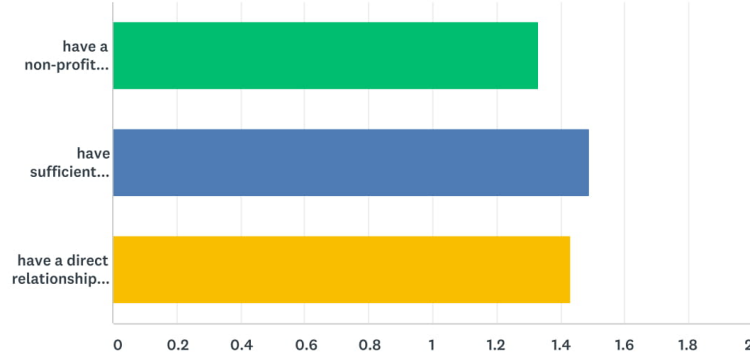


ANSWER CHOICES	RESPONSES	
Yes	38.46%	30
No	61.54%	48
TOTAL		78

COLLECTIVE REDRESS QUESTIONNAIRE

Q23 Are representative entities required to

Answered: 74 Skipped: 62

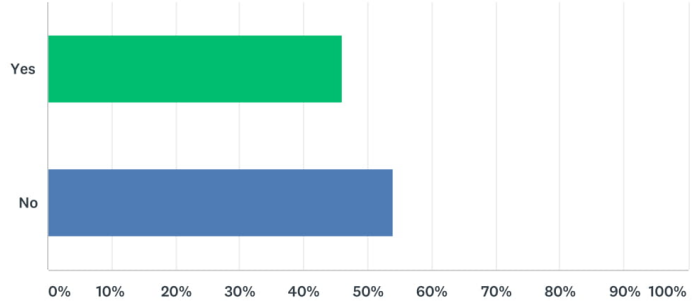


	YES	NO	TOTAL	WEIGHTED AVERAGE
have a non-profit making character?	67.14% 47	32.86% 23	70	1.33
have sufficient capacity in terms of financial resources, human resources, and legal expertise?	50.75% 34	49.25% 33	67	1.49
have a direct relationship with the rights that are claimed to have been violated?	56.52% 39	43.48% 30	69	1.43

COLLECTIVE REDRESS QUESTIONNAIRE

Q24 Is there a list of representative entities publicly available?

Answered: 76 Skipped: 60

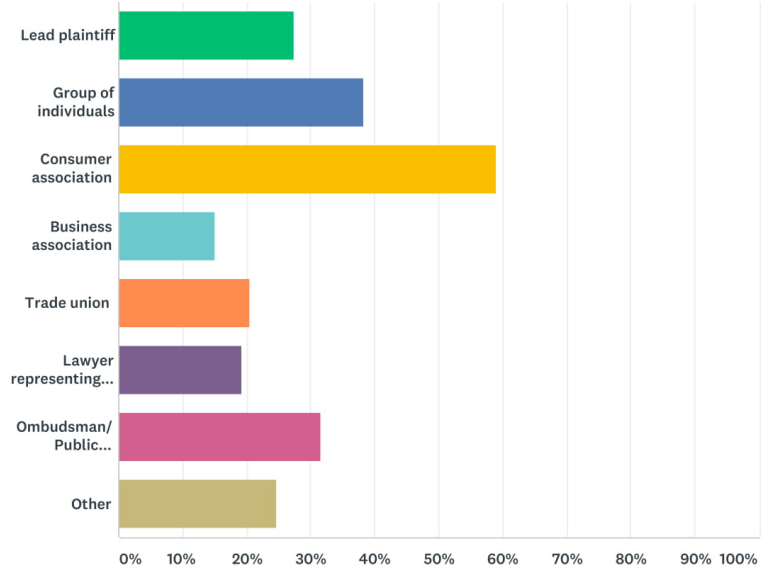


ANSWER CHOICES	RESPONSES	
Yes	46.05%	35
No	53.95%	41
TOTAL		76

COLLECTIVE REDRESS QUESTIONNAIRE

Q25 In case of compensatory collective redress, who has standing?

Answered: 73 Skipped: 63

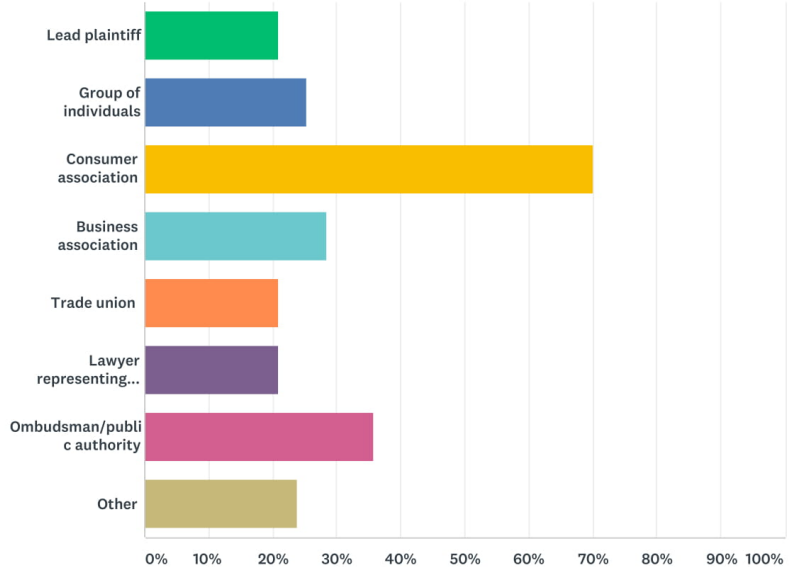


ANSWER CHOICES	RESPONSES	
Lead plaintiff	27.40%	20
Group of individuals	38.36%	28
Consumer association	58.90%	43
Business association	15.07%	11
Trade union	20.55%	15
Lawyer representing a group	19.18%	14
Ombudsman/ Public Authority	31.51%	23
Other	24.66%	18
Total Respondents: 73		

COLLECTIVE REDRESS QUESTIONNAIRE

Q26 In case of injunctive relief, who has standing?

Answered: 67 Skipped: 69



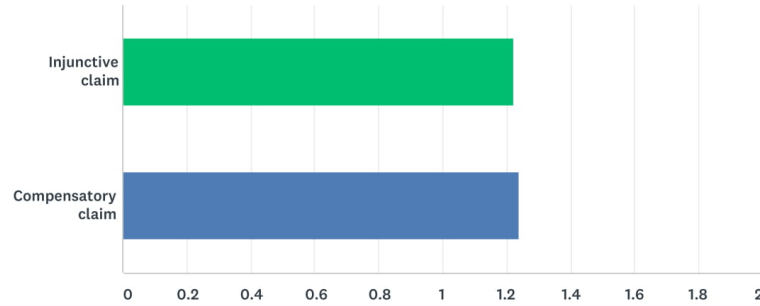
ANSWER CHOICES	RESPONSES	
Lead plaintiff	20.90%	14
Group of individuals	25.37%	17
Consumer association	70.15%	47
Business association	28.36%	19
Trade union	20.90%	14
Lawyer representing a group	20.90%	14
Ombudsman/public authority	35.82%	24
Other	23.88%	16
Total Respondents: 67		



COLLECTIVE REDRESS QUESTIONNAIRE

Q27 Do foreign plaintiffs have standing to join a claim?

Answered: 76 Skipped: 60

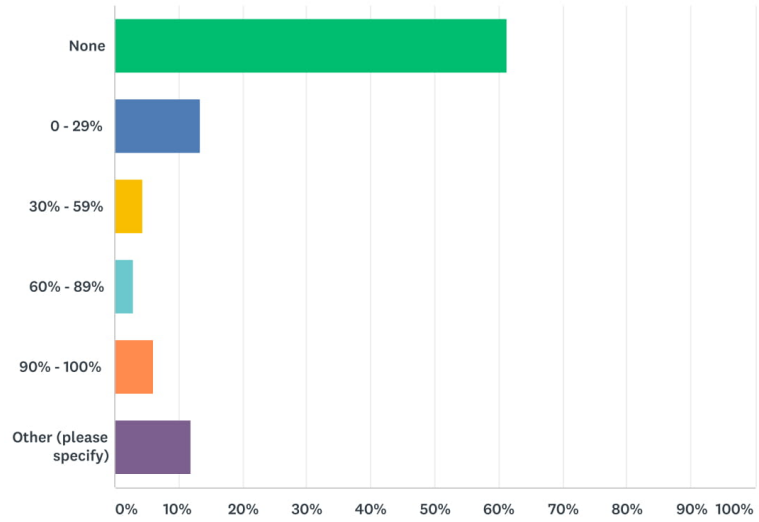


	YES	NO	TOTAL	WEIGHTED AVERAGE
Injunctive claim	78.26% 54	21.74% 15	69	1.22
Compensatory claim	76.12% 51	23.88% 16	67	1.24

COLLECTIVE REDRESS QUESTIONNAIRE

Q28 What percentage of collective actions with which you were involved had an EU cross-border element?

Answered: 67 Skipped: 69



ANSWER CHOICES	RESPONSES	
None	61.19%	41
0 - 29%	13.43%	9
30% - 59%	4.48%	3
60% - 89%	2.99%	2
90% - 100%	5.97%	4
Other (please specify)	11.94%	8
<b>TOTAL</b>		<b>67</b>

COLLECTIVE REDRESS QUESTIONNAIRE

Q29 What was the most common cross-border element?

Answered: 29 Skipped: 107

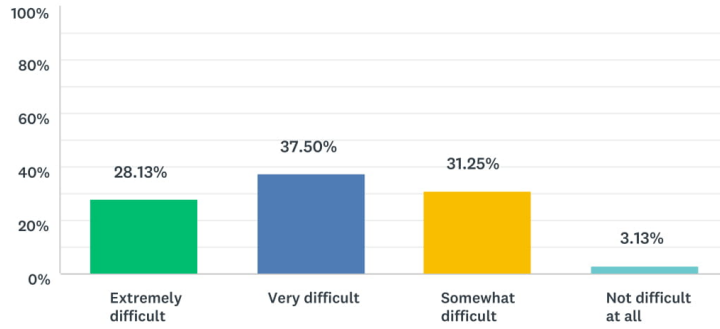
Individual answers, no graph available

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COLLECTIVE REDRESS QUESTIONNAIRE

Q30 How difficult do you find cross-border collective redress in injunctive cases?

Answered: 32 Skipped: 104

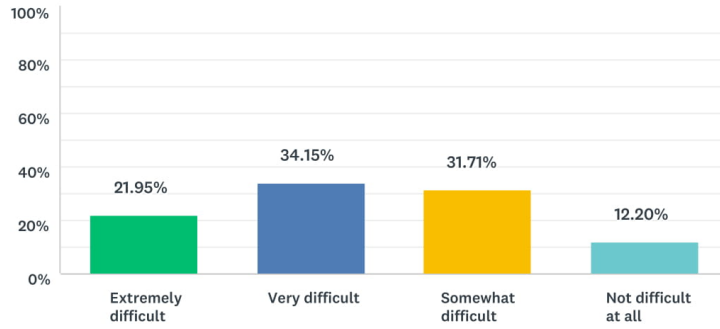


ANSWER CHOICES	RESPONSES	
Extremely difficult	28.13%	9
Very difficult	37.50%	12
Somewhat difficult	31.25%	10
Not difficult at all	3.13%	1
TOTAL		32

COLLECTIVE REDRESS QUESTIONNAIRE

Q31 How difficult do you find cross-border collective redress in compensatory cases?

Answered: 41 Skipped: 95



ANSWER CHOICES	RESPONSES	
Extremely difficult	21.95%	9
Very difficult	34.15%	14
Somewhat difficult	31.71%	13
Not difficult at all	12.20%	5
<b>TOTAL</b>		<b>41</b>

COLLECTIVE REDRESS QUESTIONNAIRE

Q32 Please specify particular problems encountered with EU cross-border collective redress

Answered: 26 Skipped: 110

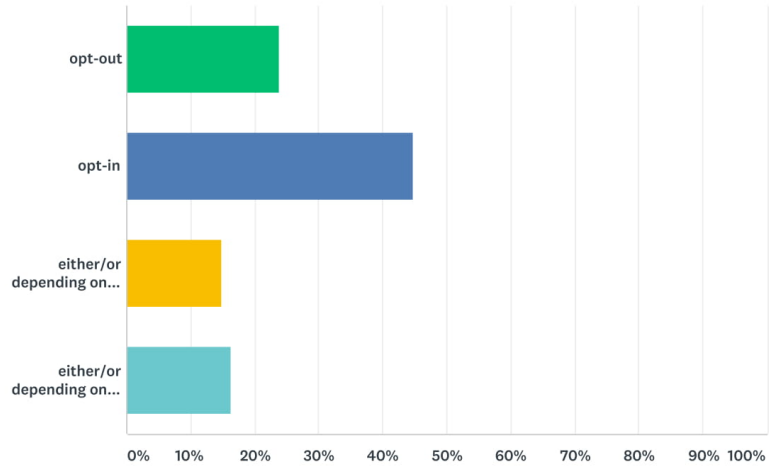
Individual answers, no graph available

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COLLECTIVE REDRESS QUESTIONNAIRE

Q33 In your jurisdiction, do you have a collective redress mechanism based on the following principle:

Answered: 67 Skipped: 69

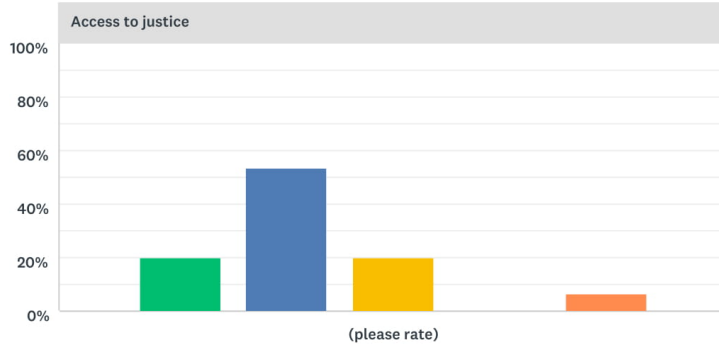


ANSWER CHOICES	RESPONSES	
opt-out	23.88%	16
opt-in	44.78%	30
either/or depending on subject area	14.93%	10
either/or depending on specifics of the claim	16.42%	11
<b>TOTAL</b>		<b>67</b>

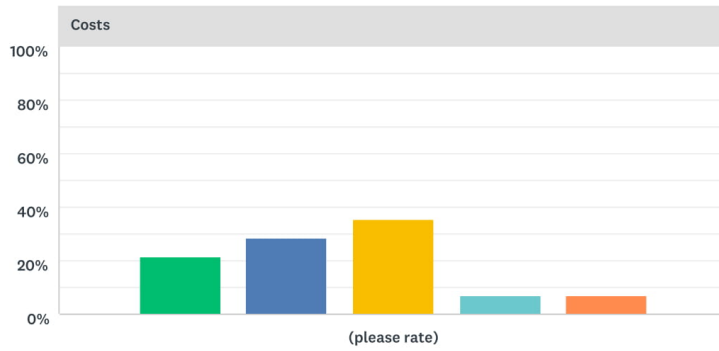
COLLECTIVE REDRESS QUESTIONNAIRE

Q34 If an opt-out regime is available, has it caused any particular problems in relation to

Answered: 16 Skipped: 120



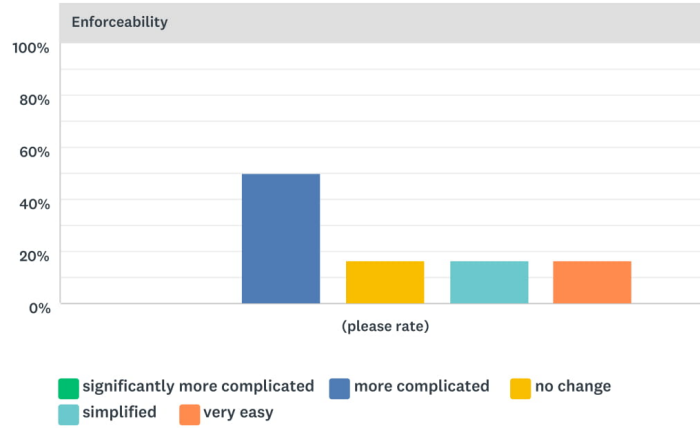
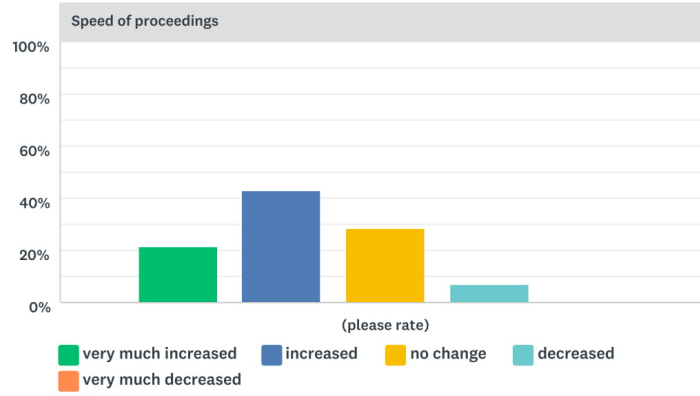
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COLLECTIVE REDRESS QUESTIONNAIRE

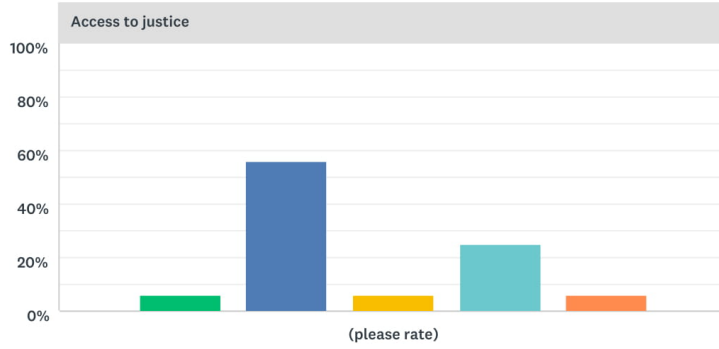


Access to justice						
	SIGNIFICANTLY MORE COMPLICATED	MORE COMPLICATED	NO CHANGE	SIMPLIFIED	VERY EASY	TOTAL
(please rate)	20.00%	53.33%	20.00%	0.00%	6.67%	15
	3	8	3	0	1	
Costs						
	VERY MUCH INCREASED	INCREASED	NO CHANGE	DECREASED	VERY MUCH DECREASED	TOTAL
(please rate)	21.43%	28.57%	35.71%	7.14%	7.14%	14
	3	4	5	1	1	
Speed of proceedings						
	VERY MUCH INCREASED	INCREASED	NO CHANGE	DECREASED	VERY MUCH DECREASED	TOTAL
(please rate)	21.43%	42.86%	28.57%	7.14%	0.00%	14
	3	6	4	1	0	
Enforceability						
	SIGNIFICANTLY MORE COMPLICATED	MORE COMPLICATED	NO CHANGE	SIMPLIFIED	VERY EASY	TOTAL
(please rate)	0.00%	50.00%	16.67%	16.67%	16.67%	12
	0	6	2	2	2	

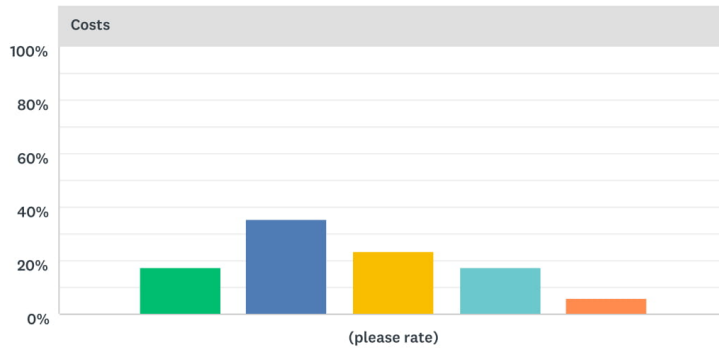
COLLECTIVE REDRESS QUESTIONNAIRE

Q35 If an opt-in regime is available, has it caused any particular problems in  relation to

Answered: 20 Skipped: 116

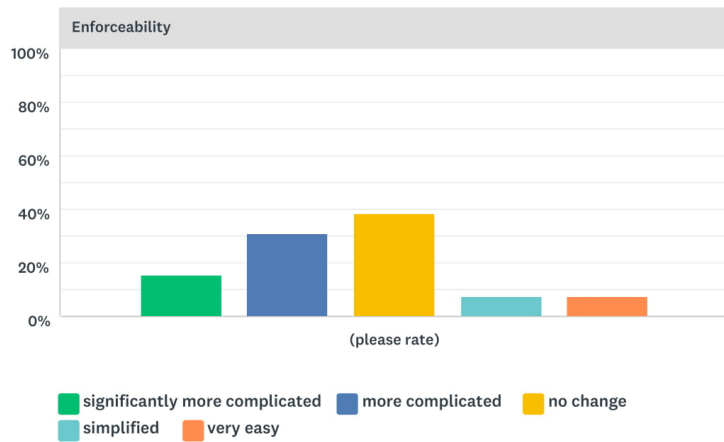
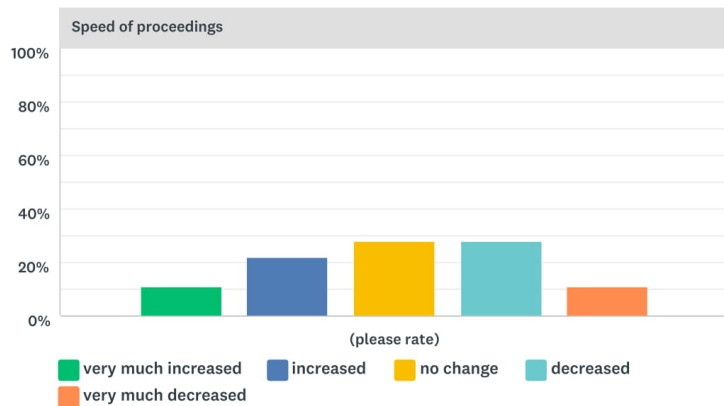


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COLLECTIVE REDRESS QUESTIONNAIRE

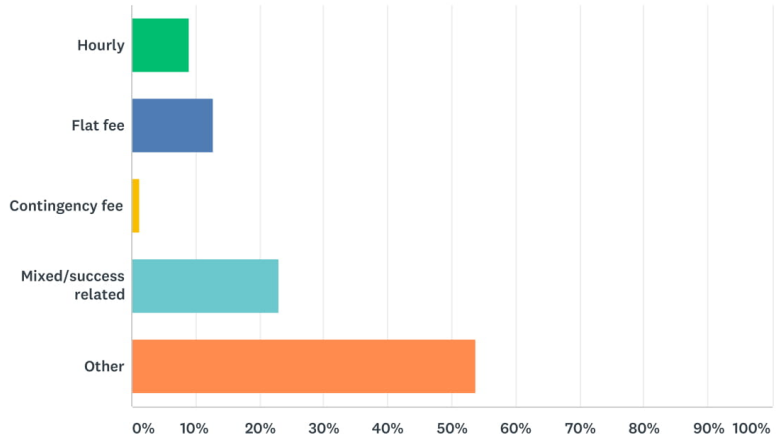


Access to justice						
	SIGNIFICANTLY MORE COMPLICATED	MORE COMPLICATED	NO CHANGE	SIMPLIFIED	VERY EASY	TOTAL
(please rate)	6.25%	56.25%	6.25%	25.00%	6.25%	16
	1	9	1	4	1	
Costs						
	VERY MUCH INCREASED	INCREASED	NO CHANGE	DECREASED	VERY MUCH DECREASED	TOTAL
(please rate)	17.65%	35.29%	23.53%	17.65%	5.88%	17
	3	6	4	3	1	
Speed of proceedings						
	VERY MUCH INCREASED	INCREASED	NO CHANGE	DECREASED	VERY MUCH DECREASED	TOTAL
(please rate)	11.11%	22.22%	27.78%	27.78%	11.11%	18
	2	4	5	5	2	
Enforceability						
	SIGNIFICANTLY MORE COMPLICATED	MORE COMPLICATED	NO CHANGE	SIMPLIFIED	VERY EASY	TOTAL
(please rate)	15.38%	30.77%	38.46%	7.69%	7.69%	13
	2	4	5	1	1	

COLLECTIVE REDRESS QUESTIONNAIRE

Q36 How are lawyers' fees paid in collective actions?

Answered: 78 Skipped: 58

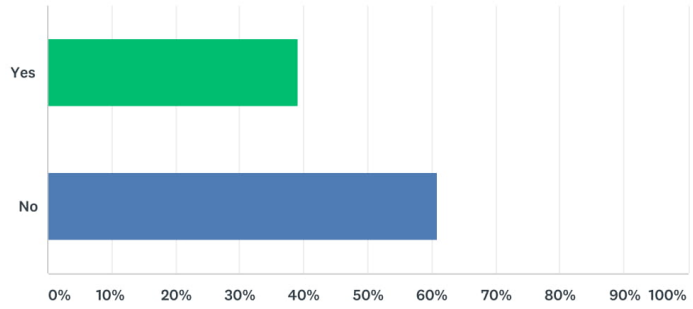


ANSWER CHOICES	RESPONSES	
Hourly	8.97%	7
Flat fee	12.82%	10
Contingency fee	1.28%	1
Mixed/success related	23.08%	18
Other	53.85%	42
TOTAL		78

COLLECTIVE REDRESS QUESTIONNAIRE

Q37 Where available, do contingency fees affect your decision whether or not to bring proceedings via collective action?

Answered: 41 Skipped: 95

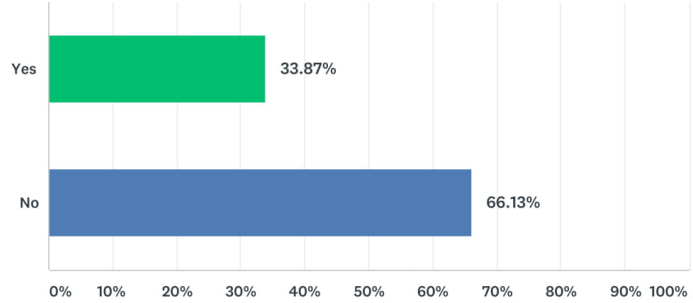


ANSWER CHOICES	RESPONSES	
Yes	39.02%	16
No	60.98%	25
TOTAL		41

COLLECTIVE REDRESS QUESTIONNAIRE

Q38 Are court fees a deterrent to the bringing of a collective claim?

Answered: 62 Skipped: 74

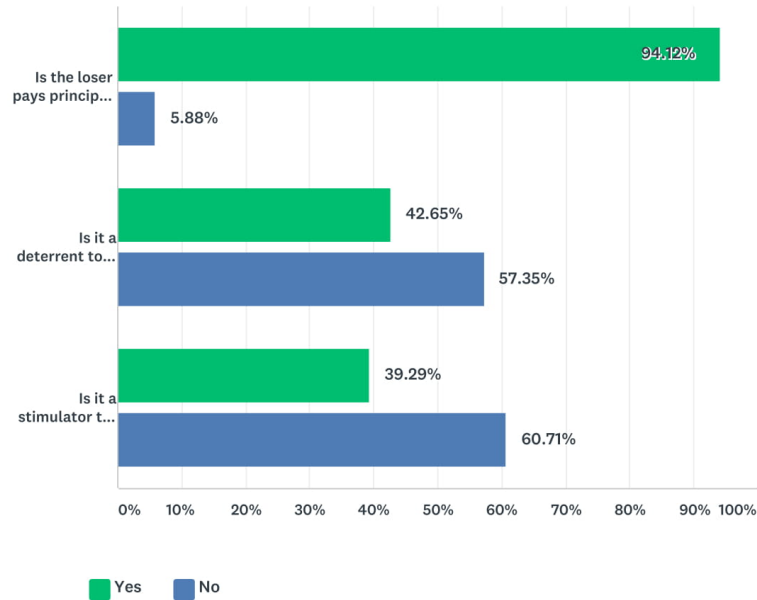


ANSWER CHOICES	RESPONSES	
Yes	33.87%	21
No	66.13%	41
TOTAL		62

COLLECTIVE REDRESS QUESTIONNAIRE

Q39 Loser pays principle: the party that loses a collective redress action reimburses necessary legal costs borne by the winning party, subject to the conditions provided for in the relevant national law

Answered: 85 Skipped: 51

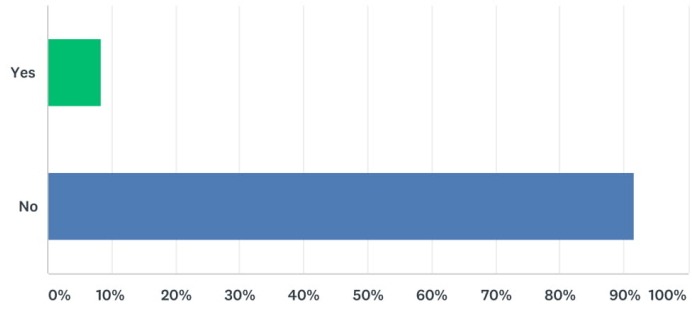


	YES	NO	TOTAL	WEIGHTED AVERAGE
Is the loser pays principle applied in your jurisdiction?	94.12% 80	5.88% 5	85	1.06
Is it a deterrent to the bringing of a collective claim?	42.65% 29	57.35% 39	68	1.57
Is it a stimulator to the bringing of a collective claim?	39.29% 22	60.71% 34	56	1.61

COLLECTIVE REDRESS QUESTIONNAIRE

Q40 Are you aware of any circumstances in which a conflict of interest has arisen in practice between a third party funder and a claimant party?

Answered: 72 Skipped: 64



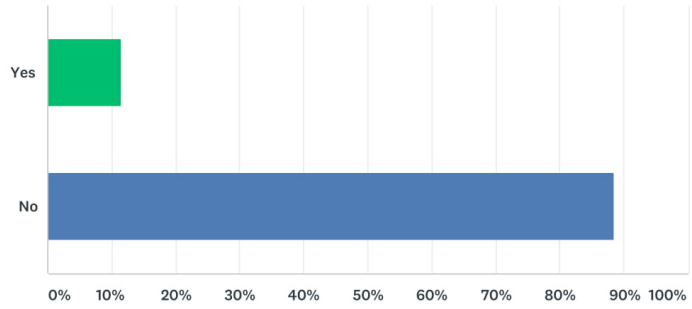
ANSWER CHOICES	RESPONSES	
Yes	8.33%	6
No	91.67%	66
TOTAL		72



COLLECTIVE REDRESS QUESTIONNAIRE

Q41 Are you aware of any situations in which a third party funder has attempted to influence the decisions of a claimant party?

Answered: 69 Skipped: 67

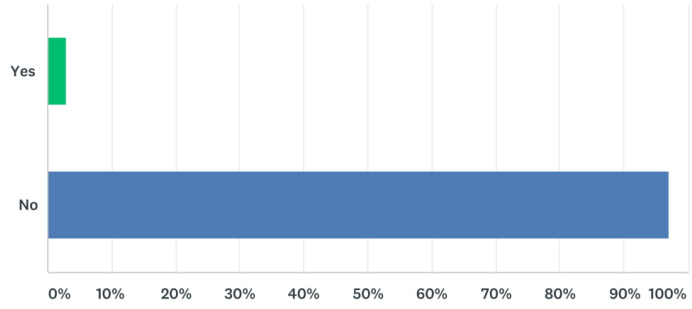


ANSWER CHOICES	RESPONSES	
Yes	11.59%	8
No	88.41%	61
TOTAL		69

COLLECTIVE REDRESS QUESTIONNAIRE

Q42 Are you aware of any situations in which a third party funder has provided funding for an action against a competitor or against a defendant on whom the funder is dependant?

Answered: 66 Skipped: 70

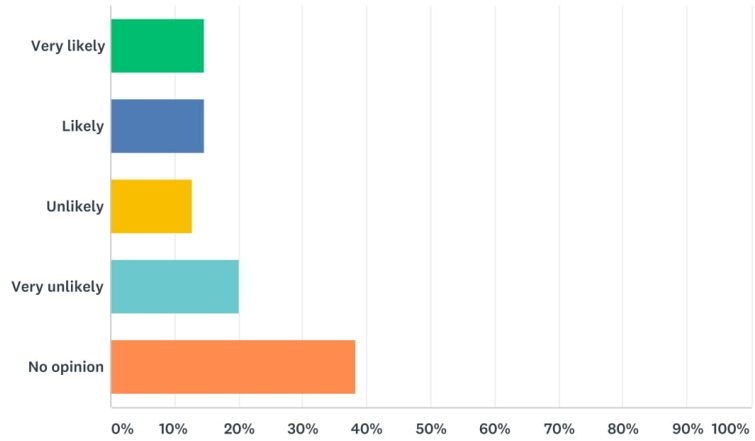


ANSWER CHOICES	RESPONSES	
Yes	3.03%	2
No	96.97%	64
TOTAL		66

COLLECTIVE REDRESS QUESTIONNAIRE

Q43 How likely are you to bring collective actions in light of your jurisdiction's rules on third party funding?

Answered: 55 Skipped: 81

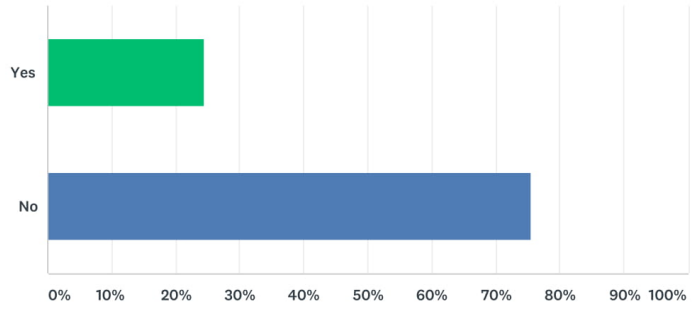


ANSWER CHOICES	RESPONSES	
Very likely	14.55%	8
Likely	14.55%	8
Unlikely	12.73%	7
Very unlikely	20.00%	11
No opinion	38.18%	21
TOTAL		55

COLLECTIVE REDRESS QUESTIONNAIRE

Q44 Are punitive or extra-compensatory damages available in your jurisdiction?

Answered: 90 Skipped: 46

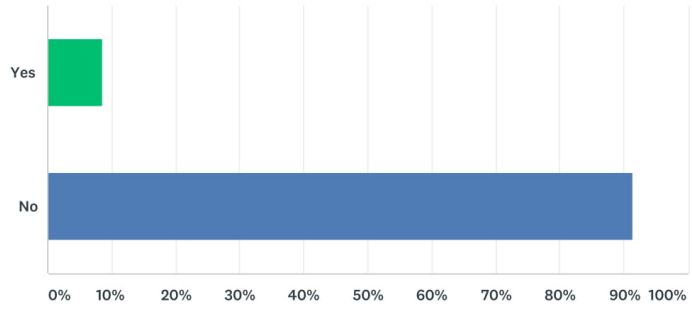


ANSWER CHOICES	RESPONSES	
Yes	24.44%	22
No	75.56%	68
TOTAL		90

COLLECTIVE REDRESS QUESTIONNAIRE

Q45 If yes, have there been instances of disproportionate overcompensation?

Answered: 35 Skipped: 101

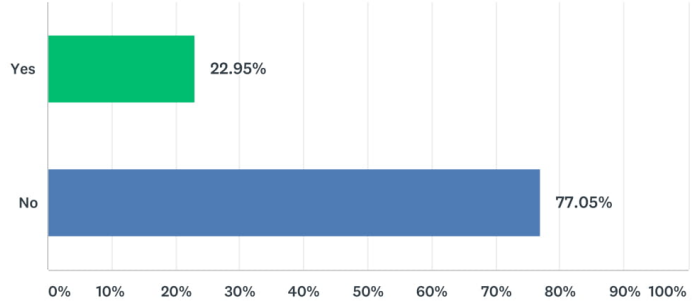


ANSWER CHOICES	RESPONSES	
Yes	8.57%	3
No	91.43%	32
TOTAL		35

COLLECTIVE REDRESS QUESTIONNAIRE

Q46 Have there been instances of abusive litigation?

Answered: 61 Skipped: 75



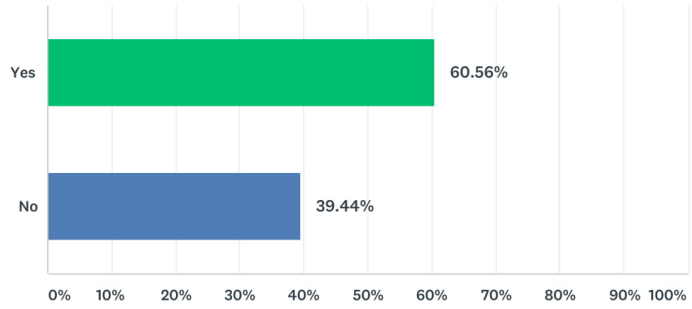
ANSWER CHOICES	RESPONSES	
Yes	22.95%	14
No	77.05%	47
TOTAL		61

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COLLECTIVE REDRESS QUESTIONNAIRE

Q47 Is it possible to seek an injunction and compensation within a single action?

Answered: 71 Skipped: 65



ANSWER CHOICES		RESPONSES	
Yes (1)		60.56%	43
No (2)		39.44%	28
TOTAL			71

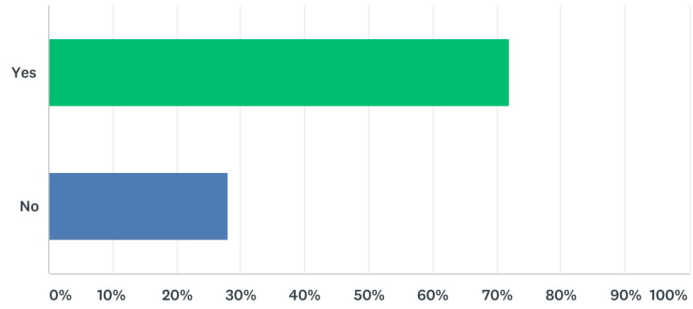
  

BASIC STATISTICS				
Minimum	Maximum	Median	Mean	Standard Deviation
1.00	2.00	1.00	1.39	0.49

COLLECTIVE REDRESS QUESTIONNAIRE

Q48 Is it possible to rely on an injunction order in a subsequent individual action for damages?

Answered: 64 Skipped: 72



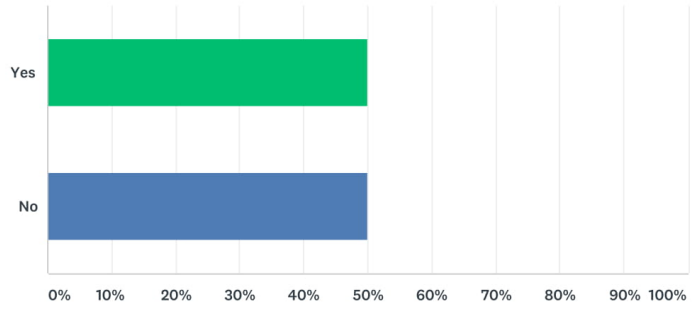
ANSWER CHOICES	RESPONSES	
Yes	71.88%	46
No	28.13%	18
TOTAL		64



COLLECTIVE REDRESS QUESTIONNAIRE

Q49 Is it possible to rely on an injunction order in a subsequent collective action for damages?

Answered: 58 Skipped: 78



ANSWER CHOICES	RESPONSES	
Yes	50.00%	29
No	50.00%	29
TOTAL		58

COLLECTIVE REDRESS QUESTIONNAIRE

Q50 If there is no legislative link between injunctive and compensatory relief, what is the practical interplay between both?

Answered: 20 Skipped: 116

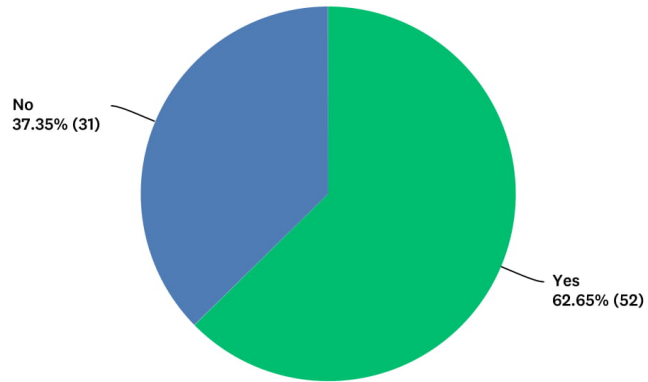
Individual answers, no graph available

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COLLECTIVE REDRESS QUESTIONNAIRE

Q51 In your opinion, is access to justice enhanced by collective redress?

Answered: 83 Skipped: 53

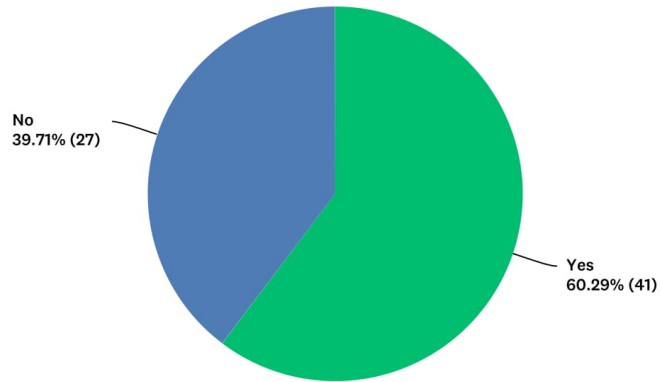


ANSWER CHOICES	RESPONSES	
Yes	62.65%	52
No	37.35%	31
TOTAL		83

COLLECTIVE REDRESS QUESTIONNAIRE

Q52 Do collective actions ensure fairness of proceedings?

Answered: 68 Skipped: 68

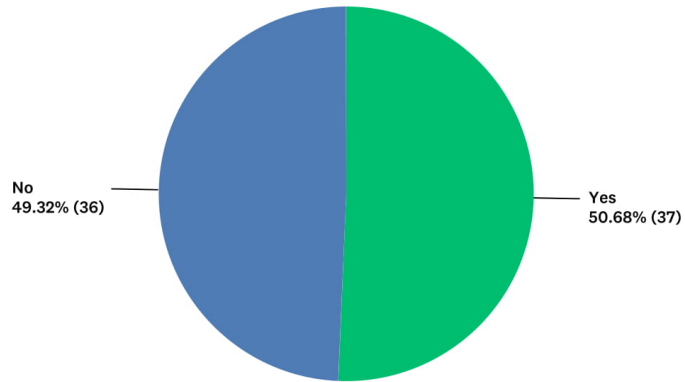


ANSWER CHOICES	RESPONSES	
Yes	60.29%	41
No	39.71%	27
TOTAL		68

COLLECTIVE REDRESS QUESTIONNAIRE

Q53 Are there risks of abusive litigation?

Answered: 73 Skipped: 63

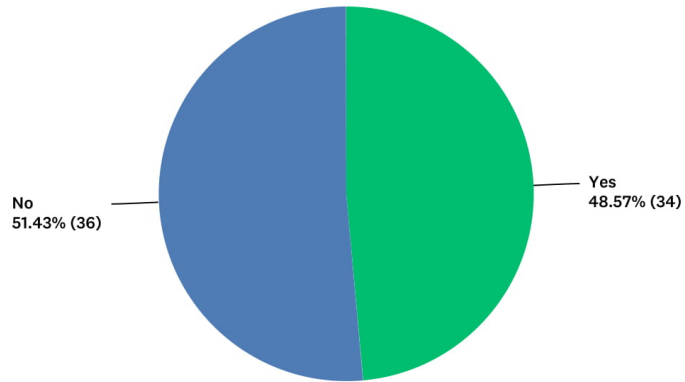


ANSWER CHOICES	RESPONSES	
Yes	50.68%	37
No	49.32%	36
TOTAL		73

COLLECTIVE REDRESS QUESTIONNAIRE

Q54 Are collective actions an effective method to obtain compensation?

Answered: 70 Skipped: 66

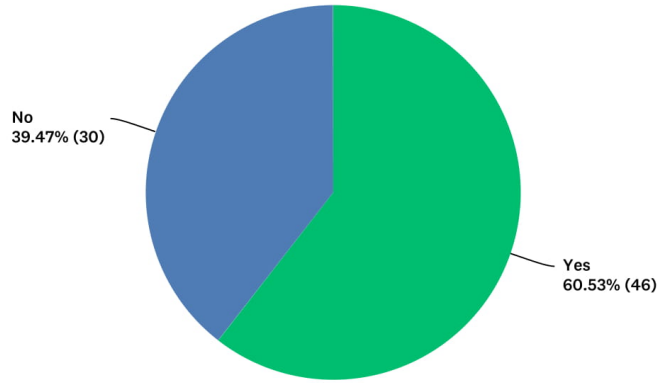


ANSWER CHOICES	RESPONSES	
Yes	48.57%	34
No	51.43%	36
TOTAL		70

COLLECTIVE REDRESS QUESTIONNAIRE

Q55 Is sufficient information available that a collective redress mechanism exists in your country?

Answered: 76 Skipped: 60

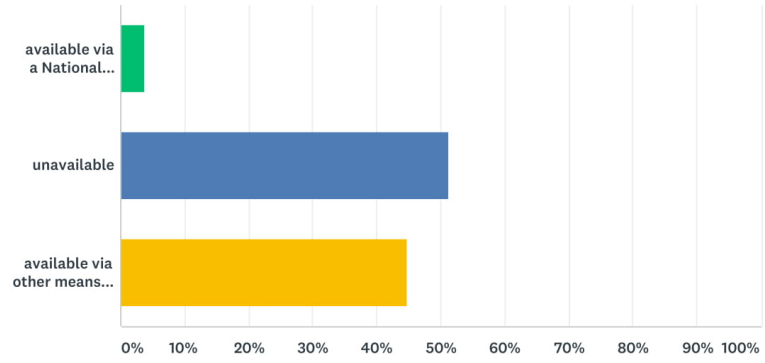


ANSWER CHOICES	RESPONSES	
Yes	60.53%	46
No	39.47%	30
TOTAL		76

COLLECTIVE REDRESS QUESTIONNAIRE

Q56 Information about ongoing collective redress proceedings is

Answered: 78 Skipped: 58



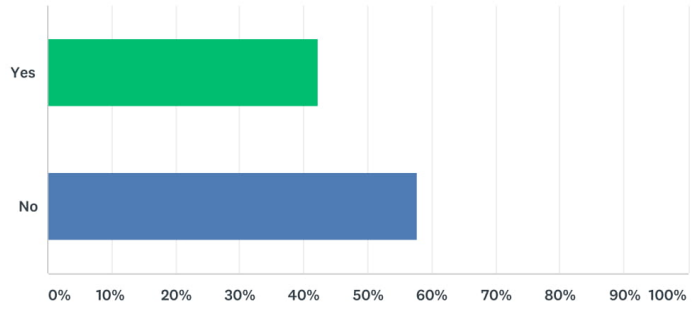
ANSWER CHOICES	RESPONSES	
available via a National Registry	3.85%	3
unavailable	51.28%	40
available via other means (please specify)	44.87%	35
TOTAL		78



COLLECTIVE REDRESS QUESTIONNAIRE

Q57 Do collective redress procedures have an impact upon your business' competitiveness within the single market?

Answered: 26 Skipped: 110

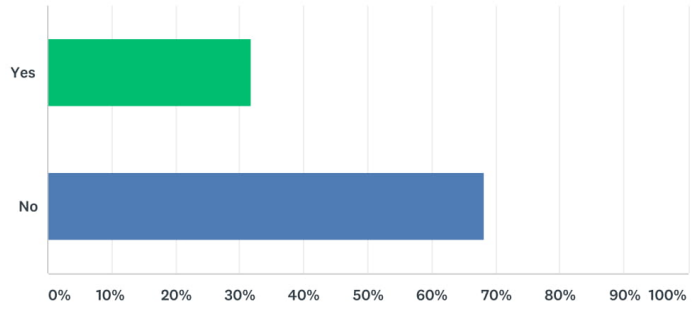


ANSWER CHOICES	RESPONSES	
Yes	42.31%	11
No	57.69%	15
TOTAL		26

COLLECTIVE REDRESS QUESTIONNAIRE

Q58 Have domestic collective actions (or the absence thereof) affected your business's investment or trade decisions?

Answered: 22 Skipped: 114

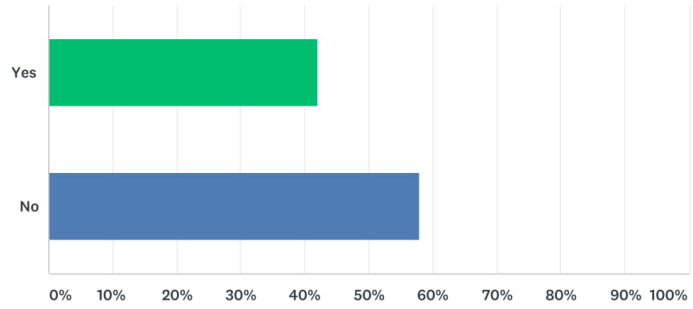


ANSWER CHOICES	RESPONSES	
Yes	31.82%	7
No	68.18%	15
TOTAL		22

COLLECTIVE REDRESS QUESTIONNAIRE

Q59 Are there any financial consequences both immediately and in the long term of collective actions?

Answered: 19 Skipped: 117

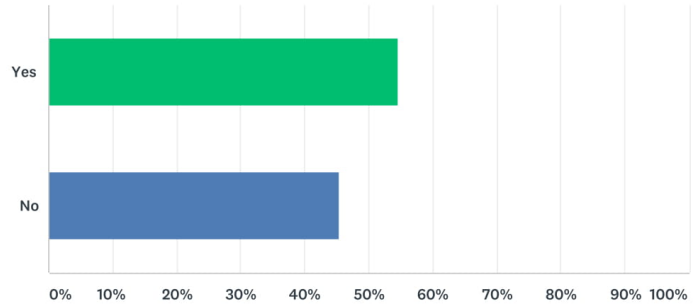


ANSWER CHOICES	RESPONSES	
Yes	42.11%	8
No	57.89%	11
TOTAL		19

COLLECTIVE REDRESS QUESTIONNAIRE

Q60 Do collective actions impose any additional administrative burden?

Answered: 22 Skipped: 114

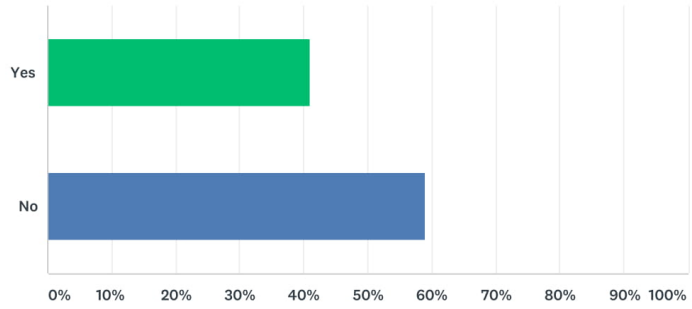


ANSWER CHOICES	RESPONSES	
Yes	54.55%	12
No	45.45%	10
TOTAL		22

COLLECTIVE REDRESS QUESTIONNAIRE

Q61 Do collective actions require the creation of additional public bodies or the reorganisation of existing public bodies?

Answered: 22 Skipped: 114

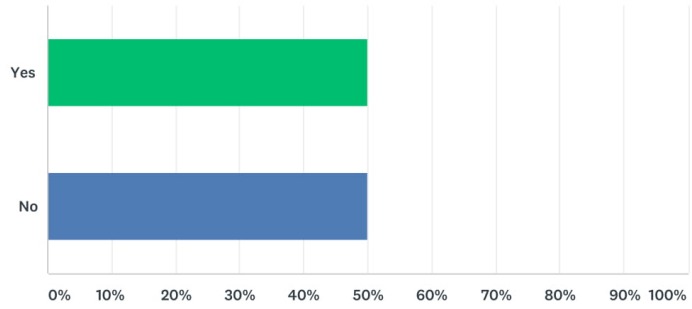


ANSWER CHOICES	RESPONSES	
Yes	40.91%	9
No	59.09%	13
TOTAL		22

COLLECTIVE REDRESS QUESTIONNAIRE

Q62 Does national collective redress legislation impact on consumers' ability to benefit from the internal market and international competition?

Answered: 26 Skipped: 110

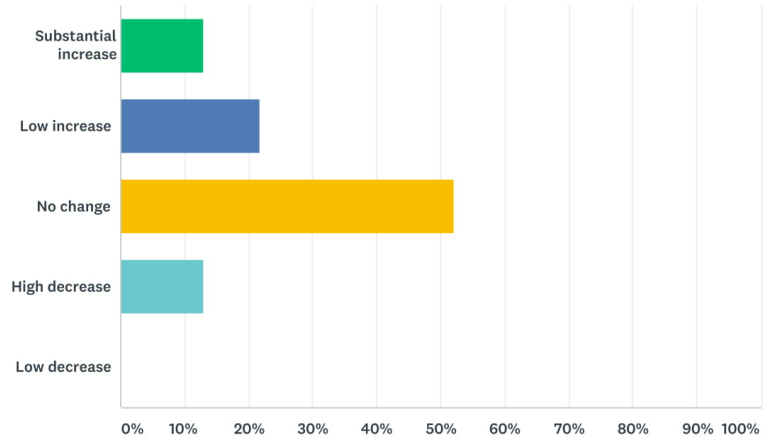


ANSWER CHOICES	RESPONSES	
Yes	50.00%	13
No	50.00%	13
TOTAL		26

COLLECTIVE REDRESS QUESTIONNAIRE

Q63 How do collective redress mechanisms affect the prices consumers pay for goods and services within your jurisdiction?

Answered: 23 Skipped: 113

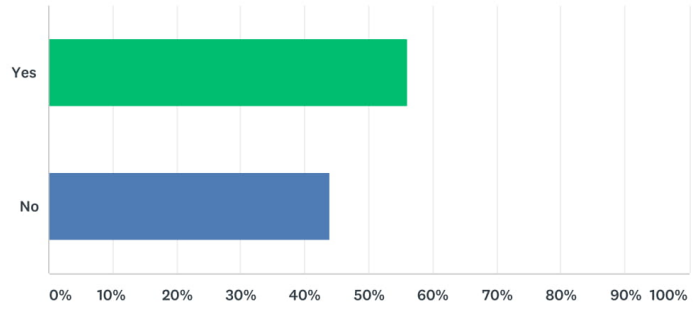


ANSWER CHOICES	RESPONSES	
Substantial increase	13.04%	3
Low increase	21.74%	5
No change	52.17%	12
High decrease	13.04%	3
Low decrease	0.00%	0
<b>TOTAL</b>		<b>23</b>

COLLECTIVE REDRESS QUESTIONNAIRE

Q64 Do national collective redress mechanisms enhance consumer confidence/trust/protection?

Answered: 25 Skipped: 111



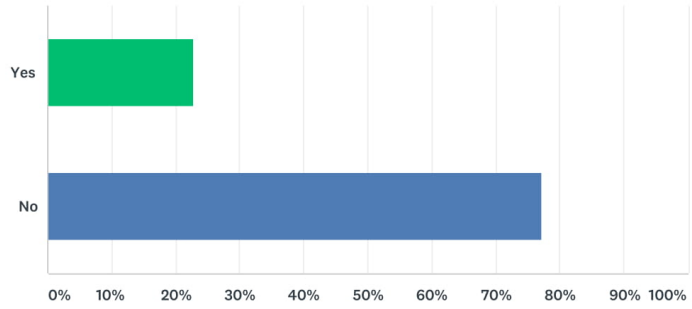
ANSWER CHOICES	RESPONSES	
Yes	56.00%	14
No	44.00%	11
TOTAL		25



COLLECTIVE REDRESS QUESTIONNAIRE

Q65 Are consumers sufficiently informed about available collective redress procedures?

Answered: 22 Skipped: 114

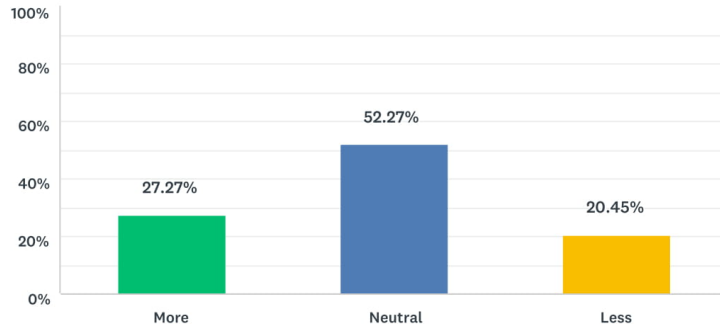


ANSWER CHOICES	RESPONSES	
Yes	22.73%	5
No	77.27%	17
TOTAL		22

COLLECTIVE REDRESS QUESTIONNAIRE

Q66 Compared to non-representative, non-collective action, what burden does collective injunctive redress have on courts?

Answered: 44 Skipped: 92

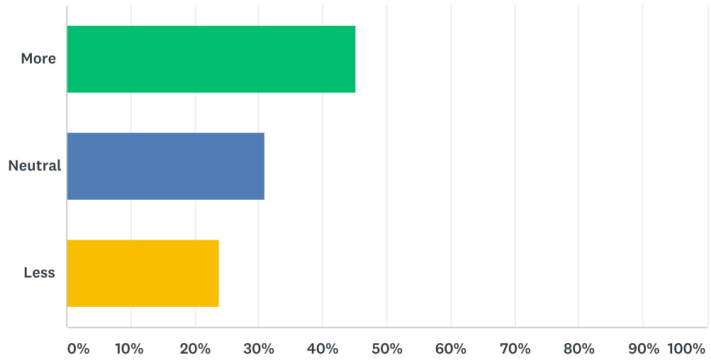


ANSWER CHOICES	RESPONSES	
More	27.27%	12
Neutral	52.27%	23
Less	20.45%	9
TOTAL		44

COLLECTIVE REDRESS QUESTIONNAIRE

Q67 Compared to non-representative, non-collective action, what burden does collective compensatory redress have on the court?

Answered: 42 Skipped: 94

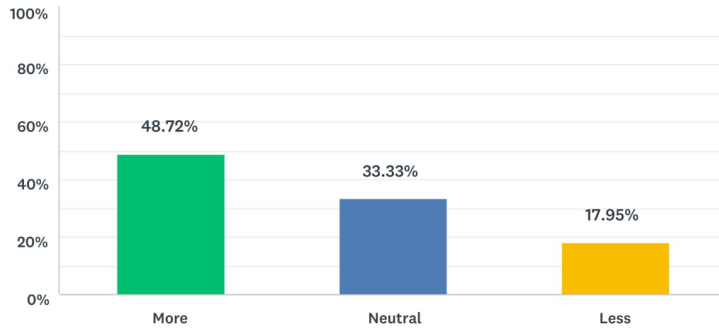


ANSWER CHOICES	RESPONSES	
More	45.24%	19
Neutral	30.95%	13
Less	23.81%	10
TOTAL		42

COLLECTIVE REDRESS QUESTIONNAIRE

Q68 How does the average time to dispose of a collective action compare to comparable non-collective litigation (e.g group litigation orders, joinders etc)?

Answered: 39 Skipped: 97

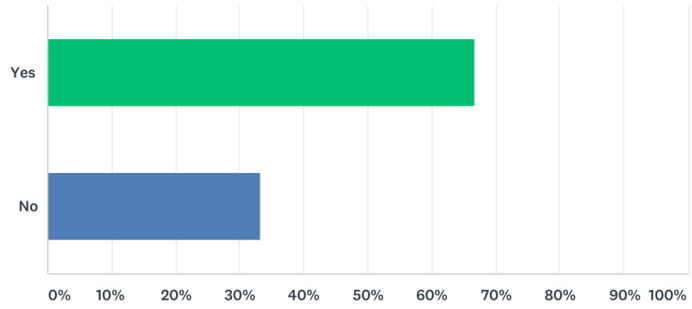


ANSWER CHOICES	RESPONSES	
More	48.72%	19
Neutral	33.33%	13
Less	17.95%	7
<b>TOTAL</b>		<b>39</b>

COLLECTIVE REDRESS QUESTIONNAIRE

Q69 Are there any aspects of the collective injunctive action procedure in your jurisdiction which could be improved?

Answered: 33 Skipped: 103

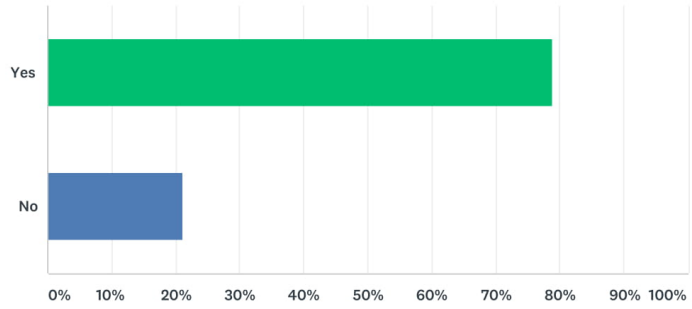


ANSWER CHOICES	RESPONSES	
Yes	66.67%	22
No	33.33%	11
TOTAL		33

COLLECTIVE REDRESS QUESTIONNAIRE

Q70 Are there any aspects of the collective compensatory action procedure in your jurisdiction which could be improved?

Answered: 38 Skipped: 98



ANSWER CHOICES	RESPONSES	
Yes	78.95%	30
No	21.05%	8
TOTAL		38

COLLECTIVE REDRESS QUESTIONNAIRE

Q71 Are there any aspects of your experience(s) of collective redress that you would like to add or comment upon but which you did not have the opportunity to state in your responses to this questionnaire?

Answered: 61 Skipped: 75

Individual answers, no graph available

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# EMPIRICAL REPORTS

## AUSTRIA

### I. Overview

In Austria, there are no special rules regarding collective redress. However, several traditional devices of procedural law can, at least to a certain extent, be used for mass litigation. A special form of group litigation has developed based upon an assignment of claims to an association, which is supported by litigation finance. This is commonly known as the 'Austrian model of group litigation', and is potentially applicable to all types of collective damages claims.

Besides the obvious possibility of individual actions, traditional devices of multi-party procedures include, in particular, joinder, consolidation of cases, test cases and the appointment of a curator. The device of joinder allows several plaintiffs to accumulate their forces against one or more defendants. In addition, Austrian courts may consolidate cases if this serves the interest of justice (sections 11 et seq, section 187 Austrian Code of Civil Procedure). In some cases, potential claimants and defendants conclude an agreement according to which only one case is filed, designed to resolve a number of similar disputes. Alternatively, the parties may agree to await the outcome of an already pending case (both approaches are being referred to as "test case"). Finally, courts may appoint a curator in mass proceedings, if this possibility is provided in a respective statute. In most cases, the appointment of a curator is only provided for purposes of service. There is, however, an 1874 statute that authorizes the appointment of a curator (representing investors) in cases involving so-called *Teilschuldverschreibungen* (partial debentures). Further details are provided in chapter II. (Traditional multiparty practice) below.

As already stated, legal practice in Austria developed a special form of group litigation that may be used in addition to the traditional devices described above. This form of group litigation is based on a combination of joinder of claims and litigation finance and is referred to as the 'Austrian model of group litigation'. Here, potential claimants assign their claims to an association (usually a consumer association). In a second step, the association brings forth an action on its own behalf. Under this scheme, it is possible to assemble large numbers of claimants, thereby allowing the association to use commercial litigation finance. This is advantageous because the claim can be pursued without any cost risks for the claimant. The 'Austrian model of group litigation' is extremely relevant in practice. It has been used successfully in a number of mass cases, for example those against banks for charging excessive interest rates or, in recent years, in lawsuits concerning poor investment advice. Further details are provided in chapter III. (General Collective Redress Mechanisms: The 'Austrian model of group litigation') below.

The mechanisms mentioned above (except the appointment of a curator under the 1874 statute) are horizontal in the sense that they are not restricted to a particular area of the law. In general, both injunctive and compensatory claims are possible. Practically, mass claims are mostly found



in tort cases and in cases for damages in connection with false investment advice.

There are no restrictions as to whom the procedures are available for. It has to be noted, however, that consumer claims are more likely under the 'Austrian model of group litigation', since the assignees bringing the cases are mostly consumer organizations.

All the mechanisms mentioned above fit into traditional civil procedure (i.e. by combining several parties, combining several lawsuits, or by 'collectivizing' mass claims by way of assignment to an institution). The Austrian Supreme Court has established certain conditions that have to be met in order to raise several claims in one action. There is, however, no certification process in the technical sense of the term.

Austrian civil procedure strictly follows the opt-in model. Therefore, the scope of res judicata is limited to the parties who actually participated. The outcome of the proceedings is consequently not binding for other members of the respective group. There are no specific measures relating to the fact that affected persons may be not identifiable. Foreign claimants may participate according to general rules of Austrian civil procedure.

There are no restrictions as to the available remedies, since all of the devices mentioned above fit into the framework of traditional civil procedure, and since Austrian law strictly follows the opt-in model.

Practically, most claimants demand monetary compensation. However, declaratory judgments would also be possible. In particular under the Unfair Contract Terms Directive, several institutions also have standing to bring suit for certain declaratory judgements,

In Austrian civil procedure, there is a general 'loser pays' rule regarding costs. In the course of the increasing use of the 'Austrian model of group litigation', commercial litigation finance has become more important in recent years. The fee for commercial litigation finance is usually between 25 and 40 percent of the overall amount of claims.

In 2017, a private association ('COBIN - Consumers-Business-INvestors') was founded, aimed at supporting collective redress litigations, particularly by raising respective funds and organizing and carrying out mass litigation under the 'Austrian model of group litigation'.

In the light of increased mass litigation, a draft for a group procedure was prepared by the Austrian Ministry of Justice in 2007 (the proposed Civil Procedure Amendment 2007). According to this draft, a new group proceeding would have been introduced applying to cases involving three or more claimants, and a large number of (more than 50) claims and concerning similar questions of law and fact. A claimant would have been free, however, to pursue his claims by an individual action instead of participating in the group proceeding. In a respective group proceeding, the court would have decided on all common questions of fact and law by judgment. In a second step, any questions not resolved in the group proceeding would have been determined in individual lawsuits.

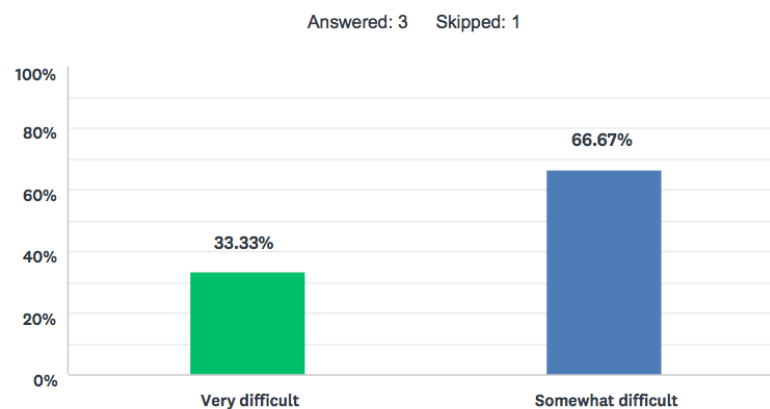
The proposed draft was, however, met with severe resistance by the Chamber of Commerce and, consequently, the Conservative Party. As a result, the draft was never even voted on in parliament and implementation of the reform is unlikely in the near future. In April 2017, the president of the Viennese bar association publicly and firmly called for legislative action.

## II. Data

Participants in the Austrian empirical study are two judges, one lawyer representing defendants and an association representing businesses and supporting them as defendants of collective actions. All respondents have significant experience in the area of mass claims, three in practice, two in policy and law reform, with a particular focus on the areas of **consumer protection and mass compensatory claims in the financial sector** (mass investor claims).

Respondents who were involved in Austrian style group actions (one lawyer, two judges) have highlighted **practical difficulties**. They generally found it **somewhat to very difficult to gain compensatory collective redress**.

### Q12 How difficult have you found gaining compensatory redress in mass claims?



The reasons quoted for the encountered difficulties are the lack of a tailored collective redress system, as well as funding issues and a prohibition of contingency fees.

The "Austrian style group action" which has developed in practice (pooling of claims either via joinder or assignment of claims, actions led by the *Arbeiterkammer* or consumer association (*Konsumentenschutzverein*) to enable mass litigation has been perceived as a compromise solution warranting further legislative action. Due to the sheer number of cases that have been brought to the courts in a number of years, notably investor claims following the financial crisis, it had become necessary to find a solution to handle these claims in practice. Despite the general approval of the "Austrian style group action" by the Austrian Supreme Court, respondents criticised that there is no proper legislative framework that establishes clear-cut rules, applying equally to each case. A joinder depends on the discretion of the court. Groups represented can comprise 50-1400 victims in one claim, depending on the case and its circumstances (e.g. legal expenses insurances may insist on small groups of claimants only). As mass procedures are currently rather canalised in Austria, through litigation funders and a small number of lawyers and associations involved, no urgent need was yet seen to

adapt the rules, but the procedure is perceived as cumbersome and three out of four respondents consider it in need of reform.

Respondents were further uncertain whether or not **access to justice** would be enhanced by collective redress and whether proceedings were streamlined, as opposed to individual actions, as the current system has its disadvantages.

As to **injunctive collective redress**, no major difficulties have been reported. It has been confirmed, but only by one respondent, that it is **possible to ask for injunctive and compensatory relief in one action** and to **rely on an injunction order in a subsequent individual action for damages**. Conditions for standing in representative actions were considered to be clearly defined. An ad hoc designation of a representative entity is, in principle, possible for compensatory collective redress. In injunctive cases, associations have standing.

Respondents did not report specific obstacles to **cross-border collective redress** (which is possible, in principle, in both injunctive and compensatory cases) but it is not frequent in practice and is considered somewhat difficult, more so in compensatory than in injunctive cases.

In practice, **settlements** will be attempted, although there are no specific rules tailored to mass settlements. One respondent highlighted a difficulty in this respect: out of court settlements are subject to a 2% settlement fee which renders ADR more complicated and there is no direct enforcement mechanism for collective settlements.

**Litigation funding** has developed in practice to enable mass claims going forward (see e.g. claims funded by Advofin). Respondents reported that funding has been perceived as a practical necessity to enable mass claims. Without litigation finance, there would be no claims, as legal expenses insurance (*Rechtsschutzversicherung*) does not cover certain types of claims.

However, it has also been stated that litigation funding is not regulated in Austria and that there is no real control preventing potential conflicts of interests and undue influence of funders.

Three respondents stated that litigation funding should be regulated to avoid problems which might, for example, occur in cases in which lawyers are commissioned by litigation funders. It was also reported by one respondent that in one case, litigation funders had an impact in practice on the question whether claims should be joined.

While collective redress has not been considered to have an **impact on the competitiveness** of Austrian businesses in the single market, it was reported by one respondent that domestic collective actions would affect business investment or trade decisions.

Three respondents also reflected upon **better solutions** and mentioned structured test case proceedings which have a binding effect on other claims (considered as economically more efficient and simpler for parties). It has also been stated that settlement procedures could be simplified, as a 2% settlement fee and lack of direct enforcement make ADR less attractive.

However, it has to be noted that there is **no uniformity of views as to future reform**.

One legal practitioner stated that even representatives of banks had admitted that the current regime needs reform and it was indicated that there is an EU-wide need for more structure (e.g. via a harmonised model for all MS in the

form of test case proceedings or mass settlements) as the current regimes would be too diverse and lacunary. Another respondent stated that reform would be needed but was not welcomed by all stakeholders. Given the reality of litigation funding, mass claims will happen in the future and more structure would be of benefit to everyone, even to businesses who, too, could (e.g. in cartel damage cases) find themselves in need of a workable collective redress regime.

In contrast, the participating association representing businesses presented a different view, refusing any additional measures for the implementation and/or the extension of possibilities for the collective enforcement of claims by measures at the level of the European Union. They do “not perceive any need for further action, considering the already existing number of instruments”.

# BELGIUM

## I. Overview

Collective redress is not available in all types of cases in Belgium: that is to say that *representative* actions are not generally available. Instead, claims which involve multiple claimants may be brought by joining individual actions under the regular rules of civil procedure or commencing a claim by multiple claimants under a single petition. The existing mechanism regarding representative actions is limited in application to actions on behalf of consumers seeking redress against business entities. This summary and the following data analysis focuses on this consumer redress mechanism, referred to as the 28 March Law.

The law of 28 March 2014 introduced a new section into the Economic Law Code entitled 'collective actions', establishing a procedure for such representative proceedings. These actions operate according to the general principles of civil liability and aim to provide compensation for damages suffered by consumers, whilst injunctions are available in regular civil proceedings they are not provided for in the 28 March Law. The scope of the law is somewhat limited: a claim may only be brought by a consumer representative which concerns the breach of a contractual obligation or one of the 31 regulations and laws listed in the 28 March Law. Furthermore, a claim may only be brought against 'a legal or natural person pursuing long-term economic aims'. Hence, group actions may only be brought against businesses or professionals and cannot be brought against governmental or other public bodies or non-profit organisations.

The Belgian legislator sought to create a quick and straightforward mechanism under the 28 March Law and this is reflected in the rules for standing and admissibility. Consumers may not initiate proceedings themselves, and instead must act through a 'group representative' who conducts the proceedings on their behalf. Such a representative must be either:

- a consumer organisation recognised by the Minister of Economic Affairs;
- an association which has been incorporated for over 3 years and has a purpose directly related to collective damages; or
- the Federal Ombudsman.

The limitation of standing to a small number of specialised organisations is intended to have two effects. Firstly, there will be no need for a detailed enquiry into the suitability of a claimant to represent the group during the preliminary stages of the action. Secondly, that such organisations will act responsibly in their pursuit of claims and only bring actions that have a strong chance of success on the merits, especially since they must fund actions from their own resources.

Again, the admissibility phase is intended to be quick and straightforward. Following the commencement of a group action the Court must determine, within a period of 2 months, whether or not the claim is admissible. A group proceeding will only be declared admissible where it can be shown that

pursuing the claim as a collective action will be more effective than the consumers bringing individual actions under the ordinary law. The court will consider all the circumstances, including: the size of the group affected; the ease with which that group can be ascertained; the complexity of the case; and the commonality of the individual claims.

There is an emphasis on **settlement** with a period of mandatory negotiation following the admission of a claim. This is unique compared to claims proceeding under the regular rules civil procedure and must be completed prior to proceeding to the trial of a claim.

Interestingly, **the law allows the parties a choice as to whether to proceed on an opt-in or an opt-out basis**. Where they are unable to reach an agreement, the court will decide, taking into account the size and value of the action as well as considering which best protects the interests of the individuals concerned. This is subject to two limitations. Firstly, in cross border cases foreign claimants must opt-in to proceedings; and secondly, cases involving physical or moral harm must use the opt-in model. The approach generally taken by the courts is to apply an opt-in system to cases where they consider that the consumers are aware that they have been a victim and to apply an opt-out system in cases where the consumer may not necessarily be aware that their rights have been infringed.

**There are few funding options available** to potential claimants in group proceedings and in private cases the burden is always on the consumer organisation to fund a claim out of their own resources. It is possible for a claimant and a lawyer to agree a reasonable and proportionate success fee although it is prohibited for a lawyer to fund the entire claim up front on a no win no fee basis. Furthermore, although third party funding is a possibility it is rarely used in practice. Since group representatives are only entitled to recover their real costs of bringing the claim it isn't possible for a funder to make a profit from a successful action.

**The key incompatibilities of the law with the regulation can be summarised as follows.**

- The 28 March Law does not provide for injunctive as well as compensatory actions although injunctions can be obtained under the regular rules of civil procedure.
- Third party funding arrangements and contingent fee agreements are not subject to the review of the courts although they are regulated separately.
- There is no possibility for a follow on action from an administrative decision
- The March 28 Law mandates the parties to negotiate and such negotiation is not based on their consent.

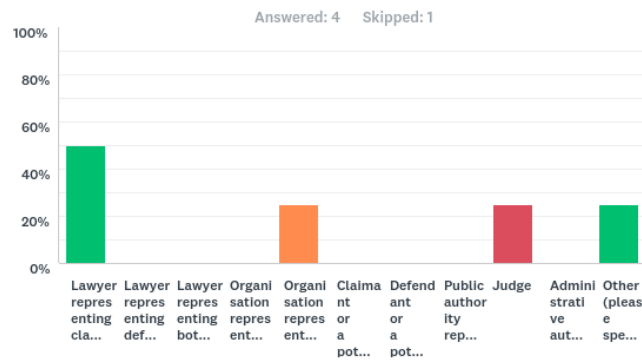
According to the information available at the time of writing **the implementation of the law has been moderately successful**. Since its coming into force on 1 September 2015, five class actions have been initiated, all by the leading Belgian consumer organisation, Test Achat.

## **II. Data**

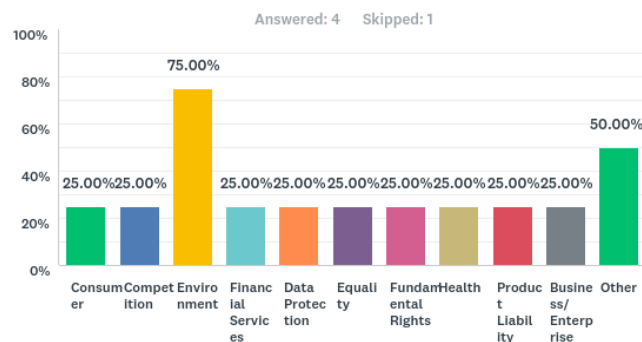
Information on the practical experience of collective redress in Belgium was collected from a range of stakeholders including lawyers, academics and one

defendant-focused trade organisation, representing a broad range of specialisms.

### Q2 Are you a:



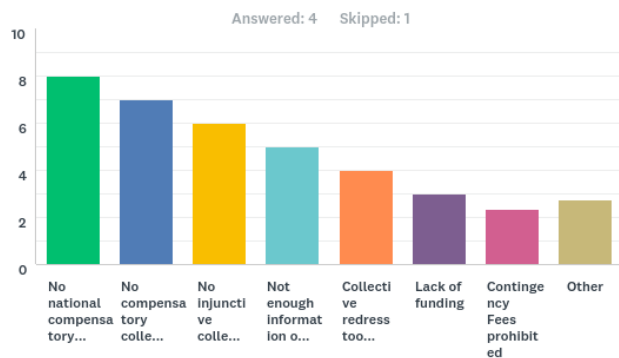
### Q3 Please select your field of expertise



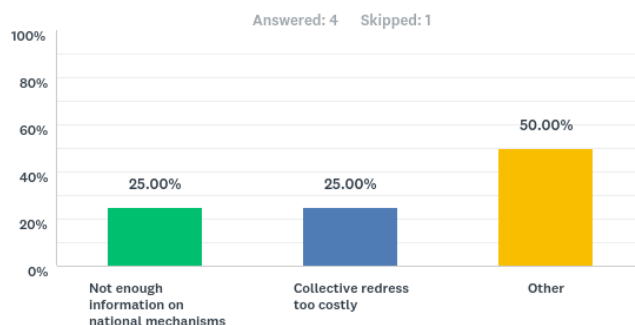
The respondents were slightly more claimant-focused with 75% having been involved in a class action on the claimant side as opposed to only 25% who had been involved on the defendant side.

The limited scope of collective redress in Belgium clearly influences the number of class actions that are brought. Those respondents that had not been involved in a group claim ranked the lack of a collective redress mechanism in their field as the most important factor for not having done so. However, both the lack of information on collective redress and the cost of proceedings are also major factors, ranking only slightly lower.

### Q11 With 1 being the predominant reason, please rank the reasons selected in question 5



**Q10 If no is applicable, please select the reason(s) for not seeking collective redress:**



The rules on collective actions were considered by all the respondents to be **clearly set out in legislation and well defined**. Problems with the legislation have been considered and resolved by the courts. In particular, in respect of the standing of foreign consumer organisations to bring collective actions in judgment No 41/2016, the Constitutional Court held that since the 28 March Law did not permit organisations from other Member States to satisfy the criteria set out in the commission recommendation to commence group actions in Belgium, the relevant provisions of the Law were incompatible with Articles 10 and 11 of the constitution taken together with the Services Directive. The 28 March Law has now been amended accordingly.

Compared to regular civil proceedings in Belgium, collective actions have three distinct phases: admissibility; negotiation; and trial. Respondents felt that this had the potential to cause significant delay to proceedings, especially considering the decision at each stage is appealable. Although the Belgian legislator aimed to create a quick and straightforward procedure, this has not been entirely successful.

**The admissibility stage**, was described as being reasonably straightforward in practice. Respondents attributed this to a number of factors but mainly that the Brussels court with jurisdiction to hear collective claims is generally in favour of admitting collective actions. The fact that there are only a limited number of associations which are permitted to bring claims means that standing is a very straightforward issue. Claimant practitioners in Belgium, when asked, did not consider that they had encountered the same difficulties with defendants seeking to challenge the constitution of the group as had been experienced in other jurisdictions.

The first **cross-border** collective action under the 28 March Law has only recently been brought in Belgium and experience in this area is therefore limited. There was a general perception amongst the respondents that cross-border collective redress introduced difficulties. However, one of the respondents (a lawyer) who was involved in the abovementioned cross-border action did not consider there to be any difficulties over and above those faced in other disputes with an international element. However, it is important to stress that as of the time of writing this case is still at an early stage.

The experiences of those surveyed indicate that **ADR mechanisms play a large role in collective redress in Belgium**. Whilst all the respondents had used ADR mechanisms, fewer had experience of litigation. Furthermore, it appears that cases are quite frequently settled before they reach trial. Those



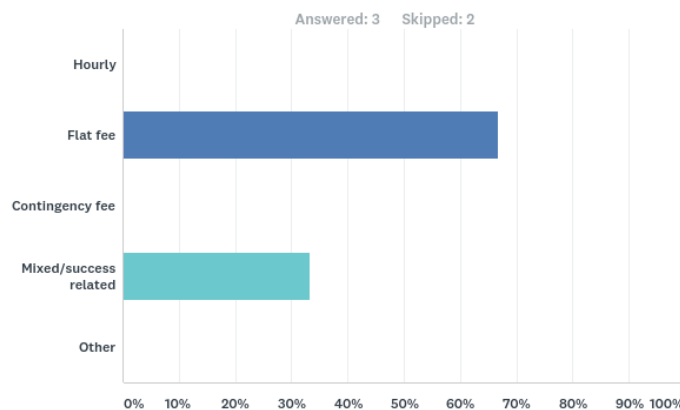
who responded stated that a **settlement was reached in approximately 30%-60%** of their cases. The opinion of one claimant lawyer was that a collective case was no more or less likely to settle than a regular, non-collective action. In this regard he contrasted the experience in Belgium with that in the USA and emphasised that collective actions were not viewed as a tactical move to force the defendant into a favourable settlement. Of the collective actions which have been brought to date under the 28 March Law, it is estimated that 25% have already settled with the remainder ongoing.

**All the participants who answered the relevant question considered that there had been instances of abusive litigation** in relation to collective proceedings; however, they did not point to any specific examples or cases. On the other hand, none of them considered that there had been instances of conflicts of interest arising between third party funders and claimants. This is unsurprising given that third party funding is rarely used in Belgium and never in representative collective actions. The respondents, therefore, are unlikely to have had much experience of it.

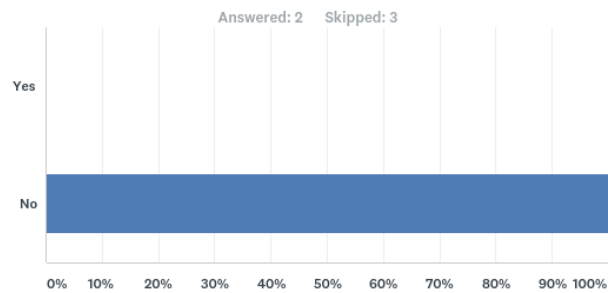
**Lawyers' fees are paid using a mixture of methods.** A reasonable success fee agreement is permitted in Belgium and is used by some claimants. **1/3 of those surveyed stated that fee agreements were used** with the remainder favouring a fixed fee arrangement. Whilst full contingency fees are prohibited this did not affect the likelihood that claimants would bring a collective action, indicating that they have access to other sources of funding for claims.

In general, funding is provided by the claimant organisation themselves. Whilst there is some limited assistance available from fee agreements, third party funding is not used since representatives are not permitted to make a profit from actions. The loser pays principle applies to collective actions as it does to other civil proceedings. The respondents stated that the recovery of costs on this basis was an incentive to bringing litigation, one respondent commented that recoverable costs were quite heavily capped.

### Q36 How are lawyers' fees paid in collective actions?

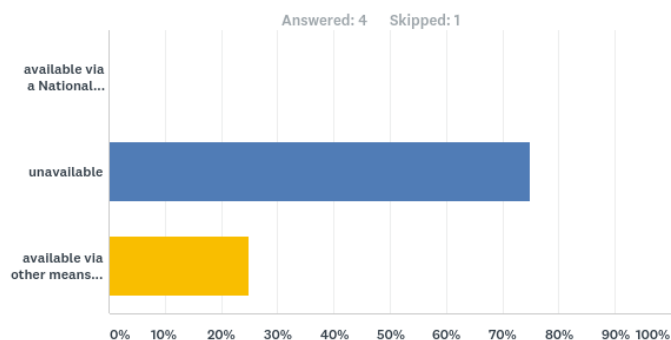


**Q37 Where available, do contingency fees affect your decision whether or not to bring proceedings via collective action?**



**The provision of information** regarding collective redress in Belgium is good in respect of the availability of proceedings but is poor in respect of ongoing claims. In the absence of a national registry, practitioners are reliant on their own research in order to obtain details on existing claims. Seventy five per cent of the respondents stated that information on ongoing proceedings was unavailable whilst one stated that information could be obtained from the court website. Provision of information in relation to current cases is therefore left to the claimant organisations themselves. Again, lack of information was shown to be a key reason for claimants not bringing collective actions.

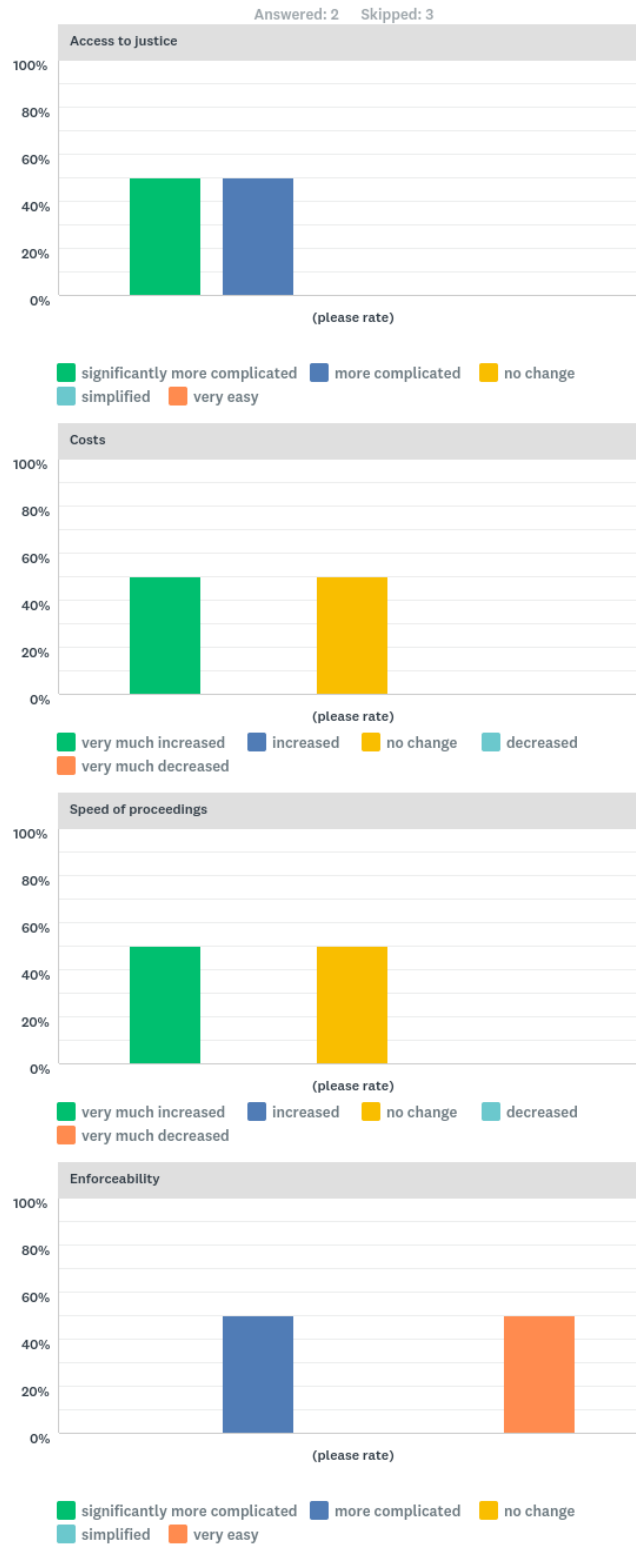
**Q56 Information about ongoing collective redress proceedings is**



Whilst **the Belgian collective redress system permits the parties to choose whether to use an opt-in or an opt-out procedure**, the opt-out mechanism was cited by respondents as causing some difficulties in comparison to the opt-in procedure, particularly in relation to access to justice, the speed of proceedings and costs. One claimant-focused lawyer who was interviewed thought that the option for either system was a particular strength of the Belgian approach. In his opinion, the choice of which system to use was highly dependent on the specific circumstances of the case. In one recent case the claimant organisation had chosen an opt-out system as a method of ensuring that as many victims were included as possible and to avoid the difficulties of obtaining the participation of a sufficient number individuals which often impedes opt-in actions. Moreover, in the aforementioned case a separate non-representative action had been commenced in parallel with the representative proceedings and had a very low number of claimants.

However, given the limited experience with opt-out proceedings, there is probably too small a sample size to draw any firm conclusions as to their impact.

**Q34 If an opt-out regime is available, has it caused any particular problems in relation to**



## **Conclusions**

The Belgian law provides for a specific collective redress mechanism in only a limited class of claims. By targeting these specific areas, and by limiting the parties who have standing to bring a claim, the Belgian legislator has sought to create a simple and straightforward method for consumer associations to seek redress on behalf of affected individuals.

On the whole, this approach appears to have been successful. The data gathered from the empirical part of the study indicates that practitioners find the system to be clearly set out and straightforward to use. Moreover, the Belgian courts are amenable to the institution of collective actions.

The system itself benefits somewhat from its limited and specialised nature. It is unclear whether such a framework could be successfully applied to a greater range of cases dealing with a wider plurality of claims and claimants. It is also of some concern that the legislator appears to have dealt with legitimate concerns regarding the possibility of abusive litigation by taking a highly restrictive approach to standing and, in some respects, deliberately making it difficult for consumers to bring collective actions. Although it is not incompatible with the recommendation, it is notable that, in contrast to most other states, affected individuals do not themselves have standing to commence a collective action.

The incompatibilities with the regulation in respect of funding and fee agreements, in that these are not subject to the review of the courts, do not have any material impact since such arrangements are so strictly limited in any event. Should the rules change such that third-party funding of claims becomes a realistic option, this would necessarily have to be more tightly regulated.

It must be remembered that the data gathered is based on very limited experience. There have only been a small number of claims brought to date, none of which have yet reached their conclusion. Whilst concerns were raised regarding the speed of the proceedings, there were no calls for reform at the present time. The overall impression from the respondents was that this was a new system which required time to develop.

# BULGARIA

## I. Overview

Bulgarian legislation provides for a **horizontal collective redress mechanism** applicable to any area of the law. Relevant provisions are to be found in Chapter 33 ("Collective Actions") of the Code of Civil Procedure (hereafter CCP). Any harmed persons, or organizations established with a purpose to defend the interests allegedly infringed, can make a claim. The action can lead to both injunctive and compensatory relief (punitive damages are not permitted). It is possible to rely on an injunction decision in the follow-on actions for damages, and injunction and compensation can be combined in one single action.

Both the opt-in and opt-out systems are applicable. The court hearing the case shall accept as participants in the process other injured parties, organisations for protection of the injured persons, organisations for protection of the injured collective interest, that have requested participation in the process within the stipulated term (Opt In), and the court decision is binding for all persons harmed by the same infringement and who have not declared that they will bring individual claim for damages (Opt Out). This raises some concerns about the courts' ability to respond to higher and more complex requirements as to their role in the collective actions proceedings.

The court is required to direct the parties to a settlement and explain the advantages of voluntary dispute resolution. In case of settlement, the court approves it only if it does not conflict with the law or good morals and if the harmed interest can be sufficiently protected.

At the request of the claimant, the court hearing the case may rule on adequate interim measures for the protection of the harmed interests. If the defendant fails to comply with the judgment, fines are applicable.

Collective actions are funded by various sources – state budget (the actions brought by the Commission for Consumer Protection), private donations, own financial resources of consumer organisations, and state funding. Third party funding is unknown in Bulgaria, and thus not regulated.

As to costs, the "loser pays" principle applies under Bulgarian law; however the court may lower the costs if they are excessive, considering the actual length and factual complexity of the case. In general, the costs of collective actions procedures in Bulgaria are high, which seems to be an obstacle for bringing new collective actions, especially by consumer organisations.

Regarding **specific sectors**, Bulgarian consumer legislation provides for a comprehensive legal protection of consumers' interests with both public law and private law enforcement mechanisms. One of those mechanisms is the collective action for consumer protection, brought in civil court proceedings. In Bulgarian consumer legislation, collective actions for injunctive relief as well as for damages were for the first time regulated in the already abrogated Consumer Protection and Trade Rules Act 1999. At present, collective actions in consumer law are provided for in Articles 186, 186a, 188, and 189 of the Consumer Protection Act (hereafter CPA) 2006.

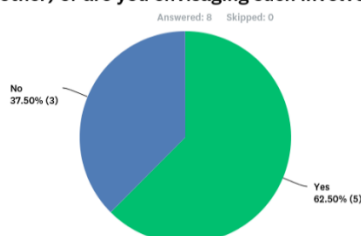
In legal doctrine, collective redress in the CPA is considered a special law as opposed to the general provisions in CCP. In case of contradiction, the rules of CPA will have priority over the CCP ones.

The efficient application in practice of the legal framework on collective redress represents, to a certain extent, a challenge for the state authorities in charge of consumer protection, for consumer associations, and for consumers.

## II. Data

The following **empirical data** were gathered from lawyers, an organisation representing claimants, a public authority representing claimants, a judge, and an academic. Their fields of expertise cover a large panel of areas, with the majority (75%) having experience in consumer law.

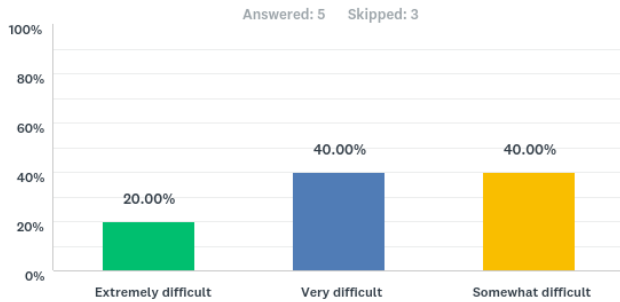
Have you been involved in collective redress (as claimant, claimant lawyer, other) or are you envisaging such involvement?



Sixty two per cent of the respondents have been involved in collective redress in Bulgaria, from their specific stakeholder position: as lawyers assisting corporate clients in class action litigation related to consumer and product liability disputes; as a judge; or as an association filing claims for injunctive orders. Among the respondents not having direct experience in collective redress, one mentions different reasons (time consuming procedure and excessive requirements for admissibility) which, according to them, lead lawyers to favour traditional multi-party procedures such as joinders.

Gaining injunctive and compensatory redress is deemed difficult by the respondents. Half of them rate the **compensatory procedure** somewhat difficult, while the other half rates it from very to extremely difficult. Respondents cite procedural hurdles in the admissibility phase and during the constitution of the class, as well as difficulties in identifying, quantifying harm to collective interests. One respondent names as well the lack of regulation on how to distribute damages after the judgment. Funding requirements, court fees and publicity expenses are also mentioned as additional difficulties. Forty per cent of those who answered the question also think collective compensatory redress places more of a burden on the court. A complex and prolonged evidence collection phase is cited as increasing the workload of the judges.

### How difficult have you found gaining injunctive order?

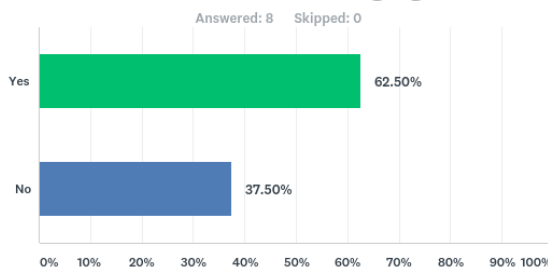


The **injunctive procedure** is judged “heavy” as well, with 60% of the respondents rating it from very to extremely difficult. Although one respondent notes the “likelihood of success”, the proceedings are described as demanding, slow and burdensome. The answers reveal a **need for a more expedient and efficient procedure**. The difficulties pertaining to class constitution are the same as in the compensatory procedure, according to two respondents. One of them reports “the threshold for injunctive orders is rather high”, and “there is also a large discretion left to the judges as to what are the appropriate measures in the relevant case”. One respondent mentions as well the lack of an effective enforcement mechanism once the injunctive order is obtained.

In general, respondents highlights the **length of proceedings**, with 75% of them pointing out the average time to dispose of a collective action is longer than for non-collective litigation. One stakeholder reports “the reason for the extended time to consider the case for the injunctive order is not the factual and legal complexity of the dispute but the heavy procedural framework. Such heavy procedural arrangements are not justified in actions for injunctive orders, the purpose of which is to establish the lawfulness / unlawfulness of the trader’s conduct”. A respondent representing a consumer association mentions that, regarding the cases brought by the association, it takes more than two years to reach a decision.

Although the court is required to direct the parties to a settlement and to explain the advantages of voluntary dispute resolution, **collective ADR and settlements** do not appear to be a mechanism parties rely upon. None of the respondents have experienced a settlement, although “attempts were made”. A stakeholder points out “the possibility for settlement in cases where injunctive relief is sought is low”, and depends on the nature of the changes asked.

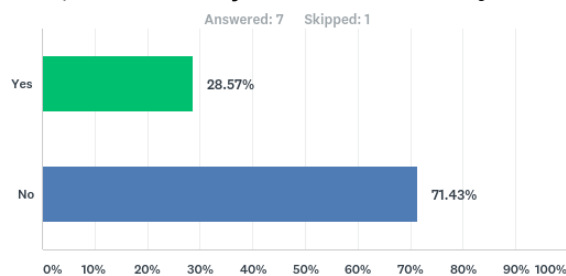
### Are court fees a deterrent to the bringing of a collective claim?



**Court fees** are an issue for 62% of the respondents. One of them points out that high costs are one of the reasons why “class actions had a difficult start in Bulgaria”. Class actions do not benefit from any exemptions regarding court fees, which are thus calculated following the general rule: court fees in Bulgaria are calculated at a flat rate of 4% of the value claimed. Consequently, as highlighted by two respondents, in a collective redress case where all the compensation claims are grouped, court fees can reach a high amount. One respondent thinks consumer claims should be exonerated.

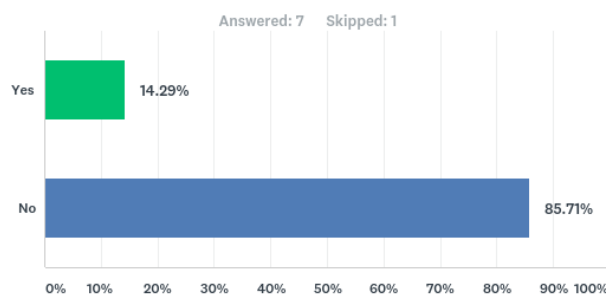
Publicity costs are reported as an additional hurdle. As pointed out by a respondent, “ensuring publicity can lead to additional expenses, which can be quite substantial - normally the courts require dozens of TV and radio spots and publications in major national media, and non-compliance would bar the development of the case”.

**In your opinion, is access to justice enhanced by collective redress?**



Seventy one per cent of the respondents to the question do not think collective redress enhances **access to justice**. The existing procedural framework is mentioned as the major hurdle preventing the success of the mechanism. The requirements in terms of demonstrating adequate representative capacity, dissemination of information about the case and associated costs create substantial barriers to case initiation. A defendant points out “the very restrictive” rules on initiation of collective claims, making it “almost impossible to reach the trial stage”. Another defendant believes that the current state of procedural requirements “protects” excessively the potential defendants, and makes the collective redress mechanism an ineffective tool to protect the rights of injured parties.

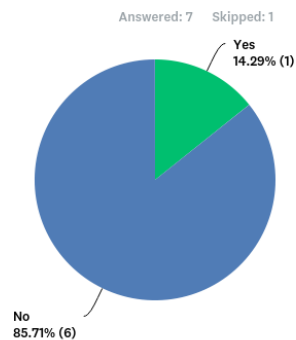
**Are collective actions an effective method to obtain compensation?**



In light of the restrictive procedural requirements and the length of the proceedings, 86% of the respondents do not think collective actions are an effective method to obtain compensation.



### Is sufficient information available that a collective redress mechanism exists in your country?



Eighty six per cent of the respondents to that question think **information on collective redress is not sufficiently available**. It appears only the Commission on Consumer Protection publishes on their website the ongoing class actions. As underlined by one respondent, "society is not really aware and familiar with this opportunity for protection of the collective interest", as it is not "a topic that is or has been a subject of discussion in the media to a sufficient extent". Another respondent mentions the need for other official sources of information to educate the general public about collective redress mechanisms in Bulgaria.

Thirty three per cent of the stakeholders gave their opinion of the **effect of collective redress on the prices consumers** pay for goods and services, and they all agree on a significant decrease. For them, the availability of collective redress in general, and the visibility of some cases, have led traders to change their behaviours, remove unfair terms and unlawful additional fees from their contracts. One respondent believes the mere existence of a collective redress mechanism removes the commercial incentive to make profits from breaching consumer protection rules, and thus generates a decrease in prices. However respondents are divided on the question of consumer confidence, and half of them do not believe collective redress enhances such confidence, as the mechanism lacks practical efficiency.

### Q53 Are there risks of abusive litigation?



Fifty seven per cent of the respondents raise concern about the risks of **abusive litigation**. One stakeholder mentions the possibility of a more powerful party "dominating" the proceedings, and another respondent targets the competition area, where claims could be raised in order to "remove another competitor from the market", rather than denounce an actual existing violation. One respondent nonetheless points out "the existing admissibility requirements" would prevent such abusive claims.

Regarding **cross-border litigation**, as noted by the respondents, no limitations exist as to the nationality of the parties that are able to bring claims, and "foreign organizations are recognized and entitled to appear

before a Bulgarian court and to join in cases". Despite the apparent absence of procedural obstacles, Bulgarian legal practice does not seem to have so far experienced any cross-border collective redress. Respondents point out potential problems regarding the complexity of the procedure: "where the plaintiffs allege that the harm extends beyond the territory of Bulgaria, the publication requirements would be expanded accordingly, which would create additional burdens for the initiation of class action proceedings".

General remarks from the stakeholders include the need for a **simplified procedure**, to obtain a timely protection of the injured collective interest. A mandatory time frame for the examination of cases is suggested by one respondent. An **effective system of interim measures** to stop the violation during the proceeding is also requested, and one respondent also makes a case for more **efficient cross-border proceedings**, to ensure rapid procedures and effective enforcement.

# CROATIA

## I. Overview

There is a general collective redress mechanism within the Croatian legal system. This mechanism is contained in the Civil Procedure Act (ZPP) and was introduced in 2011. In addition to the general mechanism, there are two types of sectoral collective redress mechanisms. One in the area of consumer law (Consumer Protection Act (ZZP)) in 2003 and the other in an Anti-discrimination Act (ZSD) in 2008. There is no out-of-court collective redress mechanism.

Both general and sectoral mechanisms operate on the basis of a **representative action**. The general mechanism was introduced as a subsidiary legal framework for collective redress and it is not applied if a sector specific mechanism is applicable. Accordingly, it is the norm that the sectoral mechanisms are commonly used in practice. All mechanisms are **injunctive** in nature. The mechanisms do not exclude the possibility of claimants initiating separate individual proceedings for damages.

In the consumer mechanism (*tužba za zaštitu kolektivnih interesa potrošača*) persons and entities with a justified legal interest in consumer collective redress, such as consumer organisations and national authorities (Article 107 ZZP) can bring claims. The aim of the representative action under ZZP is to stop the defendant from unfair commercial practice and/or the use of methods or unfair commercial terms which infringe provisions of consumer law. If successful, the court issues a judgment by which it (1) determines and defines the infringement act; (2) orders the defendant to stop with activities violating consumer protection provisions and, if possible orders the adoption of measures necessary for removal of detrimental consequences created by the defendant's unlawful behaviour and (3) prohibits such or similar behaviour in future (Article 114 ZZP) with respect to all consumers (Article 117 ZZP).

In the discrimination mechanism (*udružna tužba za zaštitu od diskriminacije*) associations, institutions or other organisations can bring claims against a defendant whose action discriminates against a large number of people, mostly a part of a specific group with certain characteristics such as age, gender, race, religion etc (Article 24/1 ZSD). It can be brought in order to seek determination of discrimination against a specific group, a prohibition of the discriminatory action, an elimination of discrimination and its consequences and the publication of a judgment determining discrimination (Article 24/2 ZSD).

The ZPP also contains traditional rules on multi-party litigation such as joinder of parties (Article 200 ZPP) and consolidation of proceedings (Article 313 ZPP).

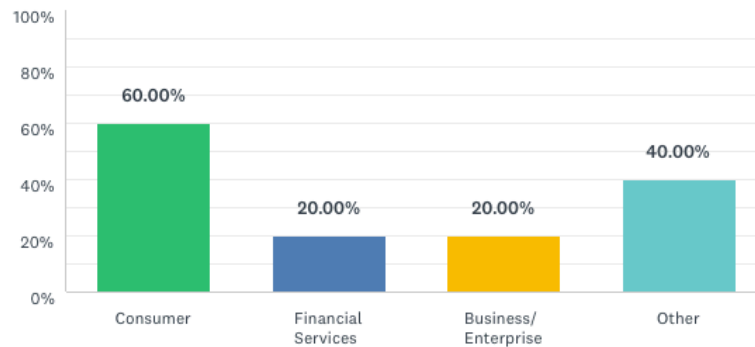
As to costs, Croatia follows the 'loser pays' principle. Currently, there are no ongoing reforms or suggested reform plans for collective redress mechanisms in.

## II. Data

The following empirical data was gathered from a lawyer representing claimants, a lawyer representing defendants, a judge and two organisations representing claimants or potential claimants. Their areas of expertise are shown in the graph below:

### Please select your field of expertise

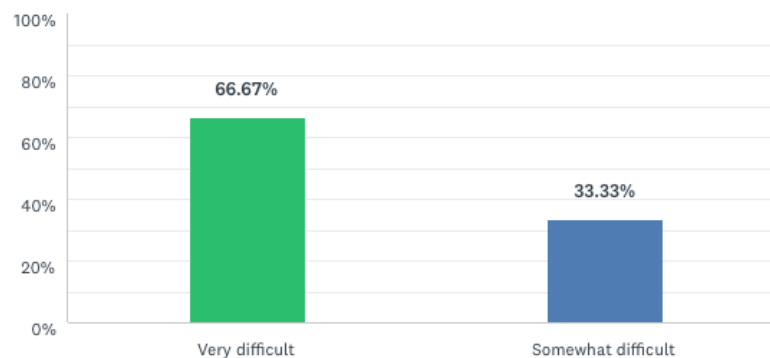
Answered: 5 Skipped: 0



Whilst injunctive relief is only possible via collective redress mechanisms in Croatia, the data evidence practical and administrative hurdles to the full use of the mechanism, particularly in the consumer sector. Where collective redress has not been sought, the **lack of funding** seems to be the main reason. Stakeholders also comment that there is a degree of **difficulty in acquiring injunctive orders** when claims are brought.

### How difficult have you found gaining injunctive order?

Answered: 3 Skipped: 2

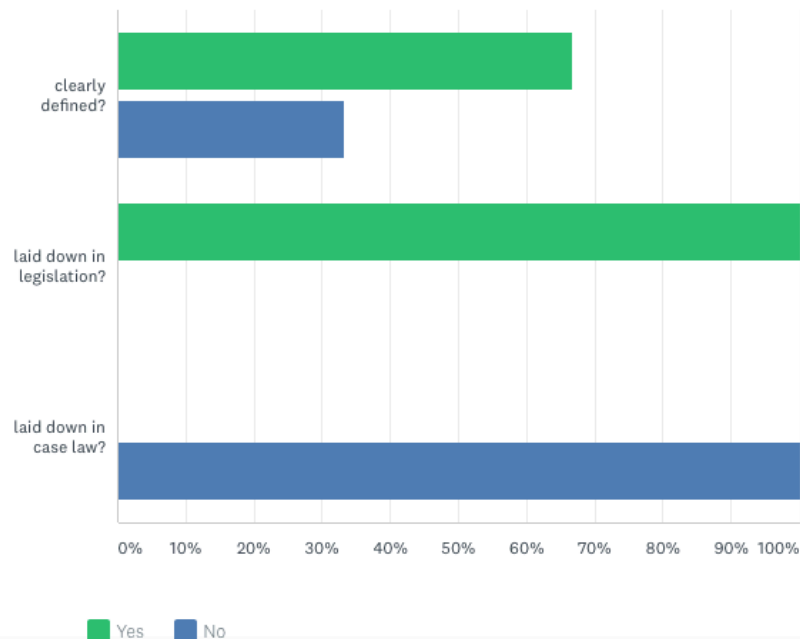


One stakeholder comments that this difficulty arises from the burden incurred in the preparation of a case. A lawyer undertaking claimant work points to the appellate process in the Croatian legal system as a reason for difficulty. This stakeholder highlighted an instance where a first instance judgment was first appealed at the second instance court, a revision procedure was also initiated at the Supreme Court and a claim in the Constitutional court was initiated.

This difficulty of injunctive relief is further exacerbated by the absence of clarity in the conditions for standing to bring a representative action. The empirical evidence demonstrates that stakeholders are mixed in their opinion on the **clarity of the conditions for standing** in the representative action

## Are conditions for standing to bring representative actions

Answered: 3 Skipped: 2



Whilst 66.67% of respondents to this question found the conditions for standing clearly defined, the respondents highlighted legal ambiguity in consumer legislation and the consequent arbitrary nature of the approval process as a concern. In the consumer sector, one stakeholder commented that “conditions for standing prescribed in the Consumer Protection Act (CPA) are arbitrary and dependent on the will of the legislator. Given that CPA prescribes that standing will be afforded to certain associations and entities by a Decision of the Croatian Government, there is no possibility for other associations to initiate collective redress proceedings. Not only is such a provision limiting to the efficiency of collective redress proceedings, it provides no possibility for a change.”

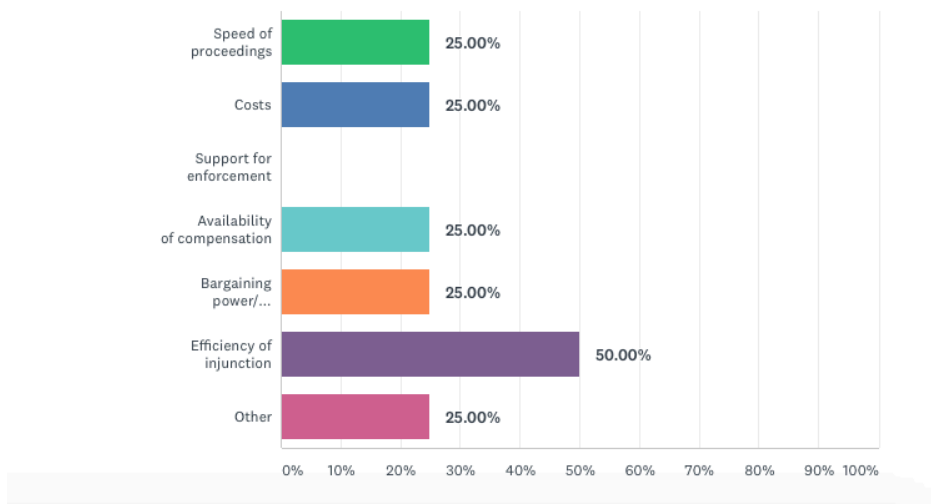
Additionally, the empirical data demonstrate that the conditions outlined in para. 4 of the Recommendation are not explicitly mandated by the CPA but are achieved indirectly via other legislative requirements. Stakeholders have commented that the “law is not sufficiently clear is [sic] that it only explicitly requires legitimate interest [for standing], but it also requires that entities are associations, which are by definition non-profit making.”

As for **standing in cross border cases**, the data evidence that standing is granted to foreign plaintiffs but is restricted by sector and registration. Interviewee comments indicate that standing is allowed in the consumer sector as provided for in the CPA. However, foreign plaintiffs can only participate if they are registered in the EU list of qualified entities (under the **Injunctions Directive**).

Notwithstanding the obstacles identified above, the empirical data evidence a generally positive appraisal of the features of the injunctive mechanism.

## Which factor(s) influenced your decision to use collective procedures to gain an injunction?

Answered: 4 Skipped: 1



In interview, a lawyer representing claimants elucidated further and commented that in collective cases, "individuals are less exposed to legal costs because they share (however there are no special rules regarding court fees and lawyer fees). Regarding speed, usually legal procedures take 5-6 years while the Franak case took only 3 years."

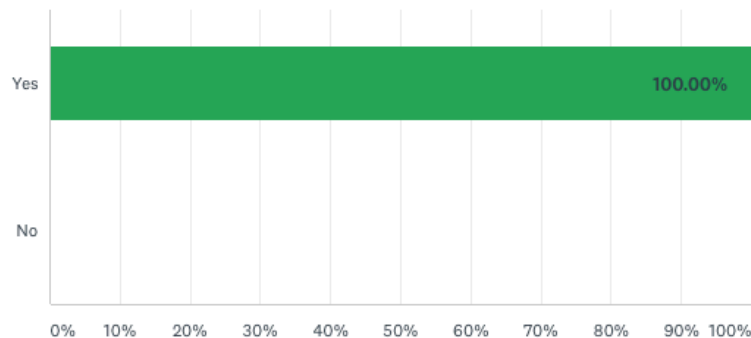
As for **follow-on actions**, stakeholders commented that individual claimants seeking damages are supported by the grant of an injunctive order in collective proceedings. However, one stakeholder has also commented that the current disadvantage of such possibility is the absence of clearly defined rules on **limitation** in collective redress proceedings.

The empirical data demonstrate that **collective out of court settlements and ADR settlements** are possible with all respondents stating that 0-29% of their collective claims were settled. However, it is not clear from the quantitative data whether this range was selected because no settlements occurred. Similarly, the data do not clarify whether settlements were pursued/reached before the start of legal action or settlements reached following suspension of proceedings. The qualitative data indicate that there is "almost no practice" or no settlements. The interview data indicate that full utilisation of settlements is not possible because of legal ambiguity. One lawyer representing defendants highlighted that "there is a fundamental problem in that it is not clear whether the settlement would be binding on individual consumers (e.g. if a consumer would start follow on individual proceeding for damages). ...This leaves settlements/mediation outside of possible courses of action, due to legal uncertainty."

Notwithstanding the difficulty and ambiguity mentioned above, the empirical evidence demonstrates that stakeholders generally perceive that there are advantages to collective redress mechanisms, in particular **access to justice**.

## In your opinion, is access to justice enhanced by collective redress?

Answered: 3 Skipped: 2



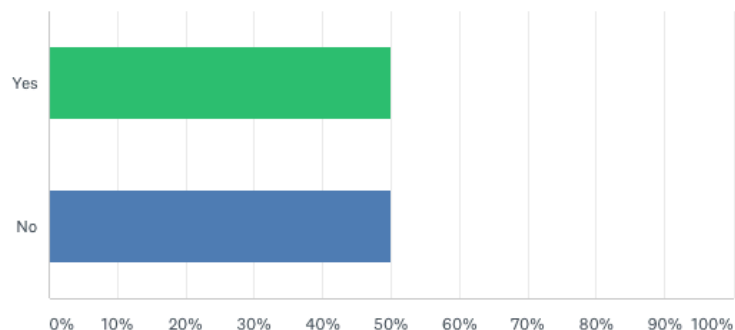
Notwithstanding the difficulties identified above, 60% of the total respondents are of the view that collective redress mechanisms improve access to justice. One respondent highlighted the advantage that individual plaintiffs to recover damages that they would otherwise be hesitant to seek as a basis for their selection. As it concerns consumers, one stakeholder was of the opinion that one advantageous effect is the increased purchasing power of Croatian consumers and a change of attitude from some defendant stakeholders (such as banks) towards Croatian consumers.

In light of the perspectives outlined in the preceding paragraph, 60% of respondents are of the view that the injunctive procedure is an effective **method to obtain compensation**. The basis for this view stems from the practical and legal benefits of the injunctive order to subsequent individual actions for damages. Benefits of speed and lower risk were cited. However, for a lawyer representing claimants, the "limitations stemming from requirements on standing, rules on limitation and lack of funds available to consumer association" in the collective proceeding "limit the scope of its effectiveness."

However, the responses from stakeholders highlight a divergence of opinion on whether collective redress proceedings ensure **fairness of proceedings**.

## Do collective actions ensure fairness of proceedings?

Answered: 2 Skipped: 3



Whilst the response to the question shows a 50:50 split in the structured question, 3 respondents gave comments to the question. Of these, two respondents were concerned that fairness of proceedings can be negatively

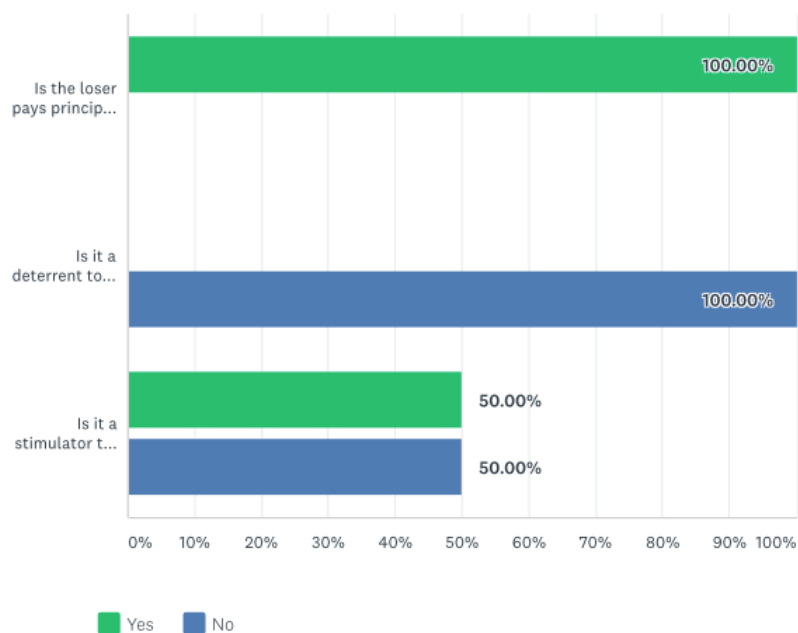
affected by the political and social pressure exerted when collective proceedings are brought. One commentator has opined that “at the moment collective redress proceedings in Croatia are considered as proceedings of high political significance (especially the Frank case) and in that sense they are influenced by different interest groups (including the ones representing the interests of the so-called "large capital").” However, the empirical data show that stakeholders undertaking defendant work are also of the view that their class of stakeholder is disadvantaged, particularly by the **lawyers’ fees** system.

As to **cost of proceedings**, the empirical data show that **court fees** are not a deterrent to the bringing of collective claims. However, the data also demonstrate that the current method of calculating lawyer’s fees can disproportionately favour claimant lawyers and their clients. A stakeholder undertaking defendant work opined that “tariffs are based on the value of the subject matter of the dispute, and fees are according to Croatian bar association tariffs. This can cause a problem when the issue does not have a monetary value (e.g. the Frank case on contract terms). The parties will not easily agree on the value of the case and if no agreement is possible, the court/judge determines the value. In the Frank case, the judge determined a value of 50,000 euros per bank, which is very low once translated to lawyers’ fees especially as this case was then estimated at millions of euros. ...in this case this estimation really reduced financial risks for the representing consumer association.”

There is a relationship between this consequence of the lawyers’ fees system and the views of 60% of stakeholders that the **loser pays principle** is not a deterrent to the bringing of a collective claim.

Loser pays principle: the party that loses a collective redress action reimburses necessary legal costs borne by the winning party, subject to the conditions provided for in the relevant national law

Answered: 3 Skipped: 2

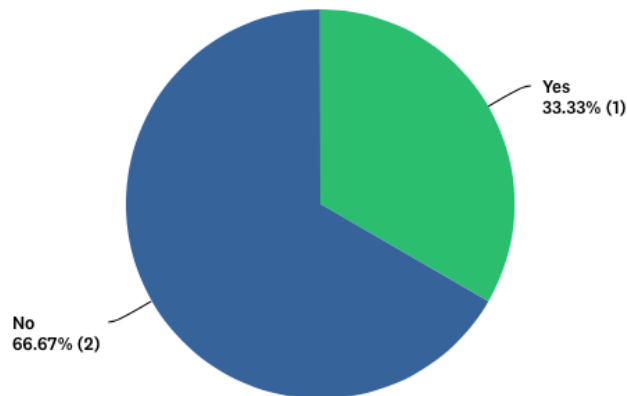




There is also a similar correlation between the calculation of fees and lowered financial risk of claimants to the respondents' answers on risks of **abusive litigation**.

Are there risks of abusive litigation?

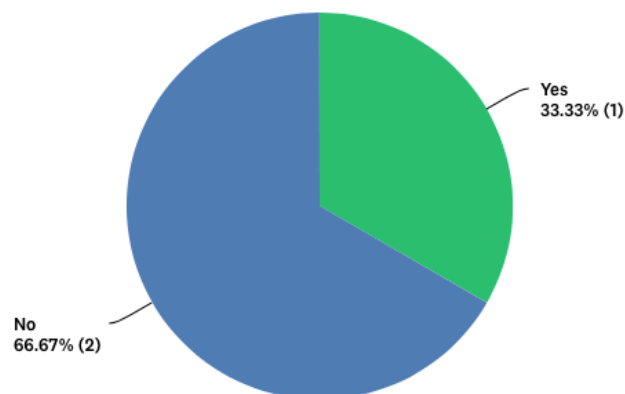
Answered: 3 Skipped: 2



The empirical data also demonstrate that **information about collective redress mechanisms** and existing proceedings is inadequate.

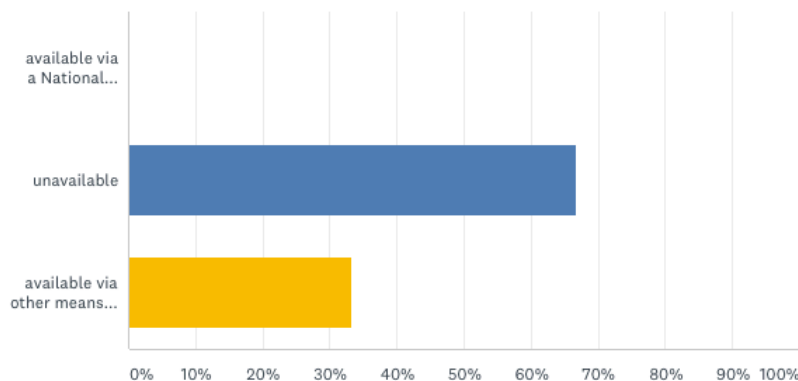
Is sufficient information available that a collective redress mechanism exists in your country?

Answered: 3 Skipped: 2



## Information about ongoing collective redress proceedings is

Answered: 3 Skipped: 2



For one claimant type stakeholder, whilst information on collective redress is available. There is no official institutional support for informing consumers adequately. The level of information available to consumers is entirely dependent on the ability of the consumer association in question and media coverage.

**General comments** for improvement of the collective procedure include the acceptance of ad hoc representatives. In the Franak case for instance, people came to the lawyer as a group but it was difficult to find an association who wanted to represent them, because of loser pays principle. The association Frank that originally put the case together, had the money and was willing to sue, was not authorised. They convinced the association (Protosac), on the agreement to bear the costs.

A central recommendation from stakeholders was to remove the legal uncertainty regarding settlements. Other suggestions include a registration process for individual claimants in order to address "statutes of limitation" to safeguard the interest of plaintiffs. The lawyer representing defendants was of the view that the German Muster-Feststellungsklage is a suitable alternative mechanism that should be imported into the Croatian legal system. In their view, the Muster-Feststellungsklage reduces risks regarding costs because the outcome of the model case is known.

# CYPRUS

## I. Overview

Cyprus law does not provide for a specific horizontal collective redress mechanism. Traditional mechanisms of multi-party proceedings are available (joinder), and an injunctive sectoral collective redress mechanism exists in consumer law.

Whereas Cyprus is best described in comparative-law terms as a mixed legal system, Cyprus procedural law, including notably civil litigation, falls under the English common law tradition. The primary source of law consists of legislation, largely modelled after older English procedural rules, and Rules of Civil Procedure – enacted by the Supreme Court of Cyprus itself and forming the main equivalent to a Code of Civil Procedure in continental jurisdictions. The bulk of the Civil Procedure Rules (CPR) in place date back to the British colonial era, i.e. prior to 1960, and largely follow English procedural law of the time. Case law is a formal source of law, with English case law constituting strongly persuasive or even binding authority, insofar as compatible with the Cypriot written sources of law.

In terms of remedies available and/or sought by claimants, Cyprus civil practice places emphasis on compensation but an increasing number of injunctions are sought as remedies, including an increasing number of interim relief requests. Settlement is a common occurrence in civil cases. However, the relatively low cost of court expenses and easy access to the appellate jurisdiction allow claimants to pursue their cases more or less freely.

Cyprus has **no horizontal collective redress system** – neither the legal mechanism nor the economic and social factors that might motivate the legal profession or other actors exist in this regard. Moreover, there has so far been little discussion about reform. This report, therefore, examines instead possible solutions under general procedural law, namely with regard to consolidation of claims.

There are actually a few instances in which collective redress could have helped, including claims arising out of a mass (air) tort and claims by holders of bonds convertible to bank shares, in the aftermath of the 2013 bail-in of the two largest banks in Cyprus. The completed report discusses these case studies.

A **mechanism for consumer collective redress** has been in place for several years, by legislation implementing EU directives. Standing is conferred to any “qualified entity”, including entities listed in the Commission’s list of qualified entities and Cypriot qualified entities. The mechanism is solely injunctive. The general framework, which follows the English common law tradition, is applicable: in case of non-compliance, contempt of court and/or monetary fines apply. The court can order the immediate cessation of a violation through interim measures.

The mechanism has so far not been used and there is little evidence that there are plans to use it in the immediate future.

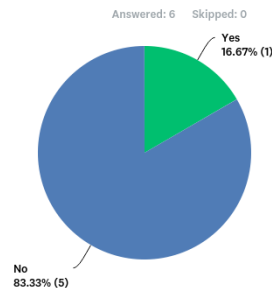
Collective redress for competition violations is a novel concept in legislation as well. There has been no instances of civil actions against competition violations by individuals and certainly none by groups of injured claimants.

Cyprus is yet to implement a Registry pursuant to the Recommendation.

## II. Data

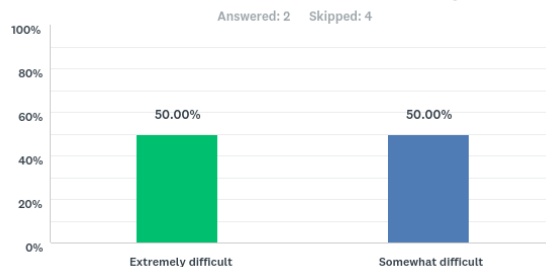
The following **empirical data** were gathered from lawyers, two organisations representing claimants, one defendant, one public authority representing claimants, and an employer organisation. Their fields of expertise cover a large range of areas, including 67% with experience in financial services, and 50% in consumer law.

Have you been involved in collective redress (as claimant, claimant lawyer, other) or are you envisaging such involvement?



The development of collective redress has been very limited in Cyprus, with only one sectoral mechanism in consumer law, solely injunctive. Consequently, just 17% of the respondents have been involved in collective redress.

How difficult have you found gaining injunctive order?



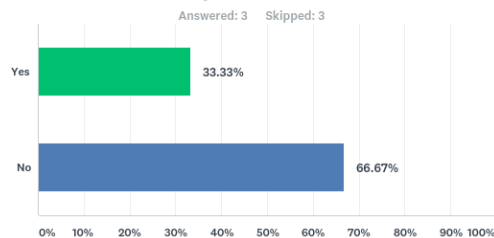
The **injunctive proceedings** are rated as “somewhat difficult” to “extremely difficult” by the respondents. For them, the factors responsible for the difficulty are the large volume of claims, and the lack of legislation in the area, which leave too much room for companies to exert their power.

One respondent cites the traditional multi-party procedural mechanisms (consolidation and joinder) as existing tools potentially providing for collective relief. If combined with the Cyprus Protection of Competition Law, or the Investment Services and Regulated Markets Law, a consolidation or a joinder might lead to the equivalent of a collective compensatory relief. However it seems to remain theoretical as, to date, no such actions have taken place.

**Collective ADR and settlements** are not mechanisms used by the parties, and they are not provided for in any legal provision. In practice, the judge may encourage the parties to settle. However, as pointed out by a

respondent, “the use of ADR in Cyprus is non-existent. Reportedly, the Cypriot Government is considering the introduction of new legislation in the field, but is apparently waiting for developments with the ADR Directive from the European Commission before taking action”.

**In your opinion, is access to justice enhanced by collective redress?**



Although 67% of the respondents who answered the question do not think **access to justice** is enhanced by collective redress, the attitude towards the implementation of a compensatory collective redress mechanism appears to be changing.

One respondent mentions that, until recently, Cypriot authorities were not willing to introduce new legislation on collective redress, however their position is changing, “probably due to the shortcomings highlighted during a recent case of consumer protection problems”. Recent cases are responsible for the government’s interest in collective redress, in particular in telecommunications, where several consumers suffered damages too limited to be “interesting” as an individual claim. The court costs were disproportionate regarding the individual damage, discouraging consumers from seeking compensation.

All of the respondents who answered the question think that a compensatory action procedure should be implemented. One stakeholder suggests the Cyprus Securities and Exchange Commission should have standing in the sector of financial services, as an authority with industry-specific knowledge.

# CZECH REPUBLIC

## I. Overview

There is no generic collective redress mechanism in the Czech Republic, and mass damages claims are thus dealt with by means of classic principles of civil procedure, such as joinder. Injunctive relief is provided for in sectoral proceedings, such as in consumer cases.

As the scope of collective redress proceedings in the Czech Republic is sectoral and limited, in most cases, the only relief that may be granted in collective redress proceedings is an injunction restraining the defendant's further conduct. The recovery of consequential damages takes place in separate proceedings, independent of the former. This leads to inefficient use of judicial resources and potentially divergent decisions.

At present, there is no comprehensive approach to collective redress in the Czech Republic. Only some specific aspects are regulated, in particular in the Code of Civil Procedure (CCP) and in some special legal acts. The main procedural codes are the CCP and the Act. No. 292/2013 Coll. on Special Judicial Proceedings (SJP). Other special legal acts provide for the distinct procedural role of specialised bodies (representative entities) authorizing them to initiate selected types of proceedings. The concerned subjects (rightholders) are not parties to the dispute. Where a representative entity is the claimant, the judicial proceeding and hearing follow the classical principles and rules of civil contentious proceedings without any special features or distinctions. However, these mechanisms cannot be considered as proper collective redress mechanisms.

Firstly, even though the CCP enables some collective features in the form of joinder of parties on both sides (§ 91 CCP) these rules are not tailored to mass claims.

Secondly, traditional procedural institutions (e.g. *lis pendens* and *res judicata*) can have certain collective consequences. In specific situations, the initiation or closure of proceedings by a decision on the merits lead to a wide suspension of the rights of others to initiate judicial proceedings based on the same claims and following the same conduct against the same defendant. Although these claimants are not allowed to participate and actively influence the judicial proceedings, final decisions are fully binding upon them. This results from § 83 para 2 CCP which defines *lis pendens* in connection with injunctive proceedings against unfair competitive behaviour, injunctive proceedings in matters regarding the protection of consumers, proceedings regarding compensation of damage or the settlement of the value of consideration under the Takeover Bid Act or in matters regarding securities and proceedings in other matters set out by special legislation. §159a CCP defines *res judicata* for the same type of proceedings as mentioned in § 83 para 2 CCP.

The current legislation in the CCP does not reflect the requirement of the right to a fair trial of all affected persons. The latter are not allowed to actively participate in the proceedings as parties. Although they may get involved in the process as joined parties (§ 93 of CCP), they are not guaranteed equal status with the parties to the action. In addition, they need to know about the proceedings in time. In fact, the law does not oblige the

court to publicly announce information about the initiation of proceedings. The abovementioned regulation also enables intentional irresponsible litigation by the defendant. It influences the other parties involved.

The fact that the legal rules traditionally referred as "collective action" in the CCP do not show any of the features of a proper collective redress can create obstacles.

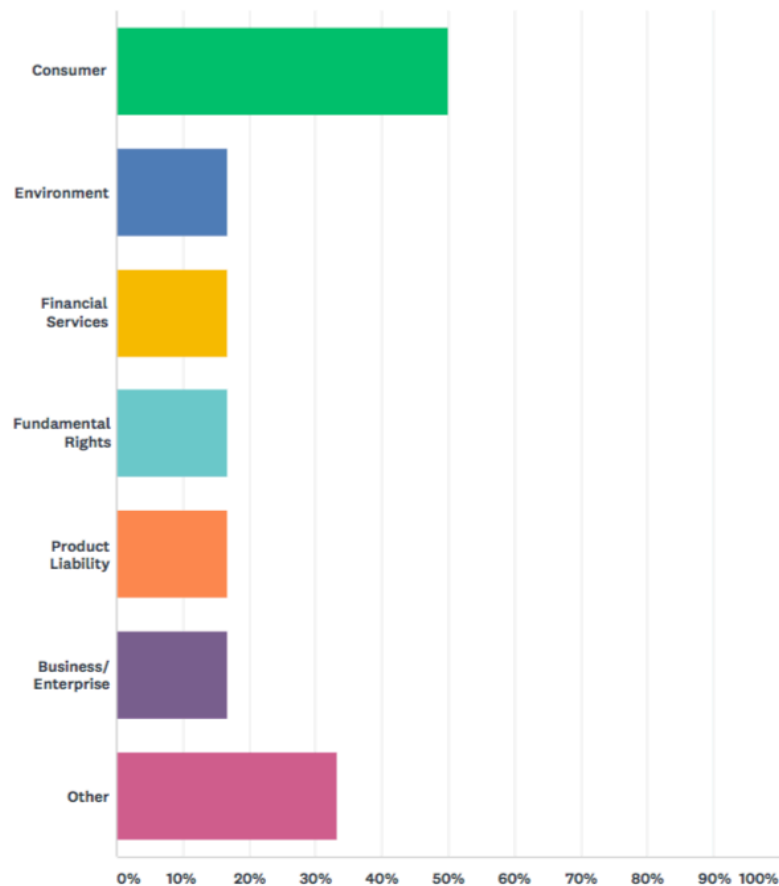
## II. Data

Participants in the survey were a lawyer representing claimants, an organisation representing defendants, three organisations representing claimants and two representatives of authorities. They have **expertise across various sectors**. Amongst the participants, one was involved in a collective claim on the claimant side.

### COLLECTIVE REDRESS QUESTIONNAIRE

#### Q3 Please select your field of expertise

Answered: 6 Skipped: 0



When asked to comment on problems with collective redress and the reasons **why collective redress was not sought** the respondents confirmed that the main reason was a **lack of a mechanism** for compensatory collective redress.

The following comments on the situation were given: the only readily available collective redress mechanism in Czech law is the right of consumer protection organisations to claim **injunctions**; there is no comprehensive collective redress mechanism that implements the principles set out in the Commission Recommendation of 11 June 2013 as to compensatory redress and no major chance is to be expected within the next few years since a whole new legislative framework would have to be created (however, one respondent reported about discussions regarding new legislation, see below).

A consumer organisation further criticised that consumer organisations can only seek **injunctive** relief against violations of consumer rights, but no compensatory relief (Sec 25 Act No 634/1992 Coll.). Czech civil court proceedings were considered as being **very slow** (more than 2 or 3 years) and collective actions in the Czech legal system were found to be **very ineffective**. The **risk of bearing legal costs** was considered too high. The focus of that organisation's activity consequently rather shifted to free consumer rights counselling and cooperation with authorities and administrative bodies to prevent unfair business practices.

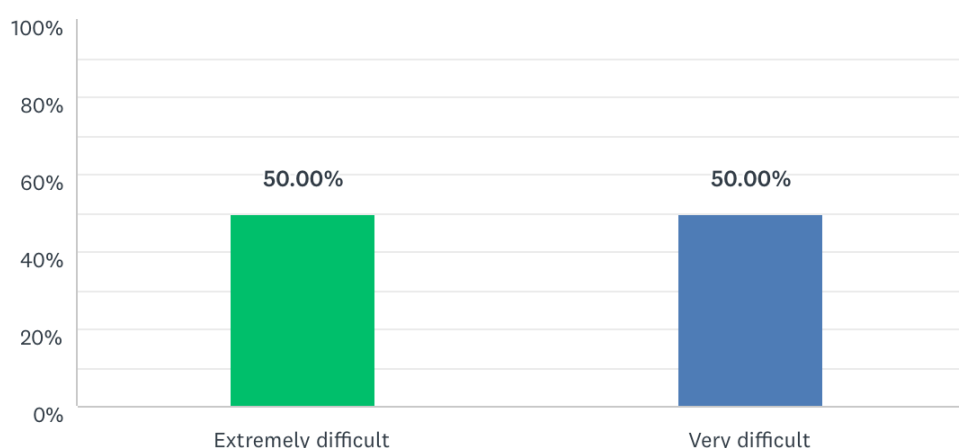
Seeking **compensatory** collective redress was therefore considered as **extremely difficult**. The only way of acting in a collective interest would be injunctive relief, which, however, is also subject to difficulties.

As to **injunctive** relief, it was, consequently, also considered as **very to extremely difficult** by the two respondents who have sought it.

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## How difficult have you found gaining injunctive order?

Answered: 2 Skipped: 4



The two respondents highlighted practical difficulties for organisations seeking injunctive orders against big companies. It was reported by one respondent that Czech courts require the plaintiff to specify very precisely what unfair commercial practice the plaintiff should refrain from and that it was sufficient for the defendant to marginally change its behaviour (e.g. slightly change the details of a form leading to unfair commercial practices) to circumvent a claim.



Whilst conditions for injunctive relief have been considered by most respondents as clearly defined by legislation, **the sole availability of injunctive relief was found ineffective** if no right is given to organisations to represent consumers in compensatory collective proceedings.

Also, one respondent stated that **collective injunctive actions should be expanded** to other areas of the law.

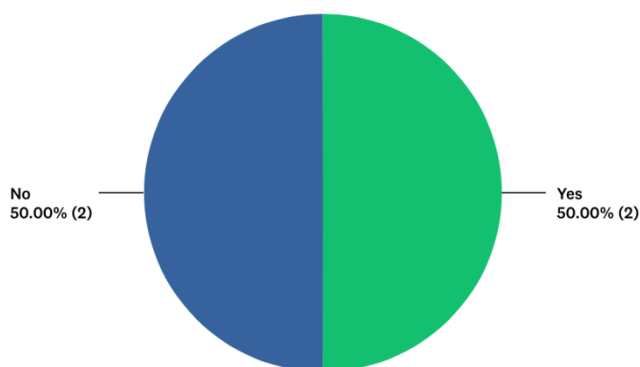
**Contingency fees** are available and, according to one respondent, play an important role in funding cases which are characterised by a power imbalance between the parties. Two respondents found contingency fees to be an important factor in deciding whether or not to bring a collective action. According to one respondent, it is generally not perceived that their availability would lead to frivolous litigation. However, as no proper compensatory collective redress regime exists, respondents could not comment from a practice perspective.

As to the **future of collective redress** in the Czech Republic, it became clear that respondents were not satisfied with the current legal situation and that a change of legislation is required. One respondent commented that they would consider collective redress as an **important part of consumer protection**, but only if set up properly which would currently not be the case in the Czech legal system.

When asked whether collective redress would enhance **access to justice**, opinions were split.

In your opinion, is access to justice enhanced by collective redress?

Answered: 4 Skipped: 2

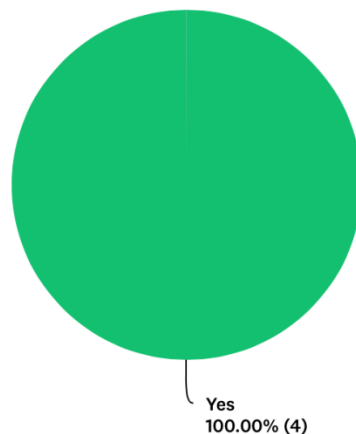


Due to the lack of compensatory collective redress, it was noted that this question cannot be commented upon. However, it was also stated that collective redress is the "most effective mechanism to address a power imbalance between the parties. It allows pooling of resources. Combined with contingency fees it makes it feasible for commercial lawyers to represent plaintiffs who could not otherwise afford representation. Collective redress also helps to counterbalance pressures on judiciary in cases involving companies-defendants using their influence in political or media circles."

When asked whether collective redress would ensure **fairness of proceedings**, all 4 respondents answering that question thought this was the case.

## Do collective actions ensure fairness of proceedings?

Answered: 4 Skipped: 2



In addition, only one out of four respondents thought that the presence of a collective redress regime might create a **risk of abusive litigation**, because each claimant might not be able to get sufficient redress. The others did not see such risk, because the loser pays principle would apply and the risk of abuse would be minimal in legal systems other than the US.

Three out of three respondents answering the question whether collective redress would be an **effective method to claim compensation** confirmed that this would be the case. Respondents stated that collective actions pool many legitimate claims which have a higher chance of success than individual claims. Another reason quoted was **procedural economy**. Furthermore it was mentioned that in cases where harm is suffered by a number of individuals, and the amount of damages that can be claimed by each individual is too low to outweigh the costs and risks of an individual action, collective action is actually the only effective method. Others could not comment on that question.

It has also been reported, that a **draft act on collective redress** is currently under discussion but that any new legislative act will not be decided upon within the next two years, ie not before 2019. Within that context, further issues are being discussed such as access to information about collective proceedings and a National Registry, similar to the current Insolvency Registry.

# DENMARK

## I. Overview

There is a **general collective redress mechanism** in the Danish legal system. The Danish Administration of Justice Act made class actions possible as an in-court procedure. This mechanism may be used for both **compensatory and injunctive relief**.

The class action scheme is primarily based on the **opt-in** model. An **opt-out** class action is possible but the class representative must be a public body authorised by law to assume this role. At present, only the consumer ombudsman has been authorised to act, but in specific areas of law.

In addition to the class action mechanism, a test case procedure exists. The test case procedure requires that an organisation (such as a trade union) acts as a representative ("mandatar") in a test case on behalf of one or more of its members. The Danish legal system also contains traditional rules on multi-party litigation such as joinder. Joinder of persons, has been used in a competition damages cases brought against different undertakings accused of participating in a cartel. **Both compensatory and injunctive relief are available through these mechanisms.**

Under the class actions mechanism, it is possible **to seek an injunction and compensation within one single class action**. It is also **possible to rely on an injunction in a separate follow-on individual or collective damages action**, if the parties are the same in both cases. The same would be the case if the injunction is based on public enforcement (e.g. a decision from the Danish Competition authorities) and the decision is final (no access to appeal). If the injunction case and the follow-on damages include different private plaintiffs, it is not possible to rely on the injunction (it would not be binding) in any separate follow-on damages case. However, it may have precedent.

As to costs, Denmark **follows the 'loser pays' principle**. The court decides how much the losing party has to pay based on, inter alia, time used and the legal nature of the issues. It is not possible to enter into a contingency fee or risk agreements. **Third-party funding is not forbidden** but does not seem widespread in practice.

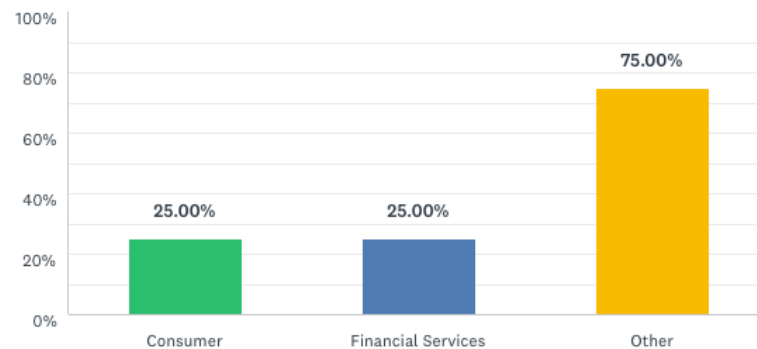
## II. Data

The following empirical data was gathered from 4 respondents: one judge, a lawyer representing defendants, a lawyer with experience of representing both defendants and claimants and a legal advisor to the Danish government.

Their fields of expertise cover the following areas:

## Please select your field of expertise

Answered: 4 Skipped: 0



Areas that make up the 'other' category include EU and International Law, Land Law and general areas of law.

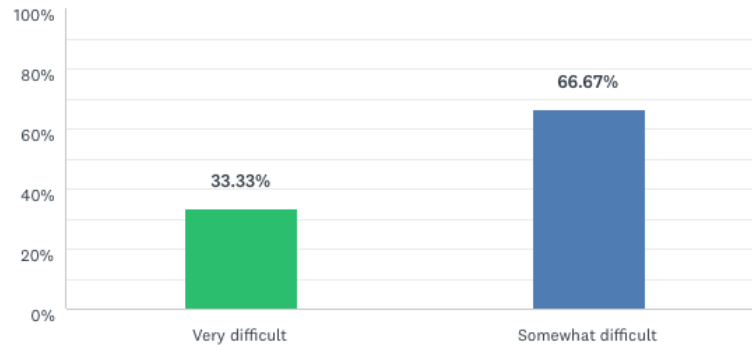
The empirical data demonstrate that the majority of respondents only had experience of compensatory collective redress. Stakeholders cited low cost and improved bargaining positions as motivators for their choice to **use collective procedures to gain compensation**.

Two out of 3 respondents were of the view that **collective procedures were an effective method to obtain compensation**. However, there does not seem to be a uniform agreement between respondents as to the extent of effectiveness. The respondent with experience of defendant work only was of the view that the procedure is not cumbersome or an obstacle to resolution of a claim. However, the respondent with experience of both defendant and claimant work proffered that there are limitations to the effectiveness of the procedure. In particular, "there are drawbacks regarding the length of time it takes for the class action procedure to run its course through the courts. The substantive questions of interpretation of similarity of law and fact and the issue of funding hinders the effectiveness of the procedure." This latter view acquires support from the results outlined below.

Seventy five per cent of the respondents found some **difficulty in gaining compensatory collective redress**. Of those who responded to this question, 66.67% were of the view that gaining compensatory redress was somewhat difficult.

## How difficult have you found gaining compensatory redress in mass claims?

Answered: 3 Skipped: 1



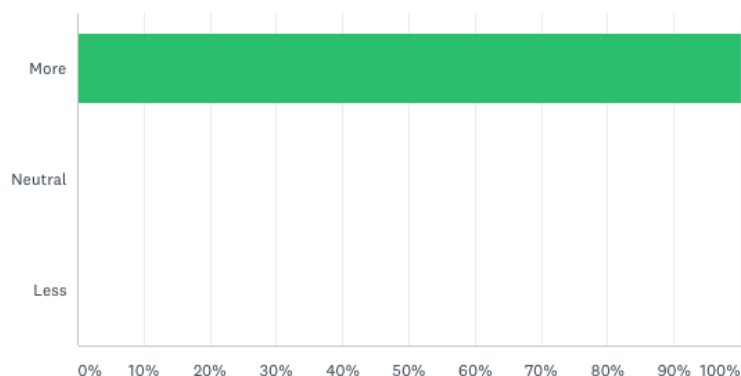
Stakeholders identified practical as well as substantive legal reasons as to why difficulties exist. One practical reason cited is the obligations placed upon a group representative in a class action in relation to the other members of the group.

Substantively, 50% of the total survey and interview respondents identified additional time taken to resolve admissibility questions in the class action proceedings as a concern. One example given in interview by the stakeholder representing defendants was a delay of 2-3 years to resolve preliminary questions before the core legal question could be answered. A respondent representing claimants was of the view that the restrictive interpretive approach of the court towards the admissibility requirements creates difficulties in bringing claims for claimants.

The stakeholders' response to the question of difficulty correlates to their response on the burden that collective compensatory redress has on the courts. Seventy five per cent of the total respondents were of the view that the class action mechanism imposed **more burden on the courts compared to non-representative, non-collective action.**

Compared to non-representative, non-collective action, what burden does collective compensatory redress have on the court?

Answered: 3 Skipped: 1

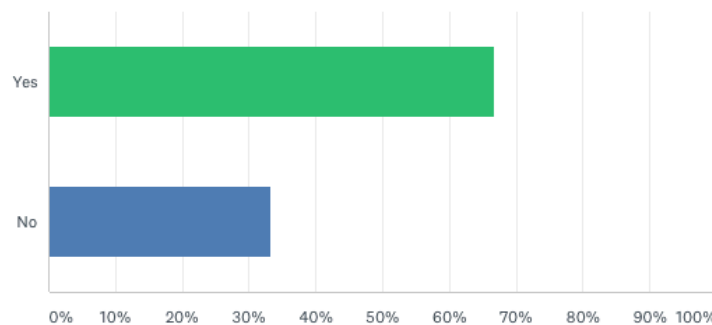


The empirical data demonstrate that **collective out of court settlements and ADR settlements** are possible with 2 respondents stating that 0-29% and 1 respondent stating 30-59% of their collective claims were settled. However, it is not clear from the data whether the range of 0-29% was selected because no settlements occurred. Similarly, the data does not clarify whether settlements were pursued/reached before the start of legal action or settlements reached following suspension of proceedings. The qualitative data indicate that settlements are part of the litigation culture with frequency depending upon area of law and type of dispute. One lawyer representing both claimants and defendants highlighted that “in some cases, the negative press from public class actions motivated defendants to settle. Also, the uncertainty of trial and the wish to restrict subsequent actions influenced the decision to settle.” For the respondent with experience of settlements, the **rights and interests of all rights were respected**. This respondent based his view upon the requirement for court approval and for each individual to accept the terms of the settlement.

Despite the deterrents outlined above, 66.67% of stakeholders were of the view that there are substantive legal benefits to the class action mechanism. In particular, 66.67% of respondents were of the view that the mechanism ensures **fairness** and **enhances access to justice**.

### Do collective actions ensure fairness of proceedings?

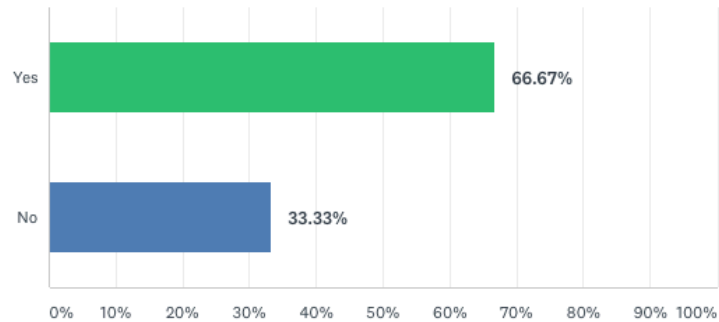
Answered: 3 Skipped: 1



A stakeholder who represents defendants commented that the court’s approach to the current admissibility rules ensures that there is clarity in the case and that all parties are clear as to the scope of the claim. The requirement for the claims to have a similarity of law and fact allows a defendant to argue that there is a dissimilarity in the claims and therefore the claims should be dismissed. The defendant is granted extra security in this regard. Furthermore, a defendant is also given ample opportunity and time to present his views and objections in the proceedings.

## In your opinion, is access to justice enhanced by collective redress?

Answered: 3 Skipped: 1

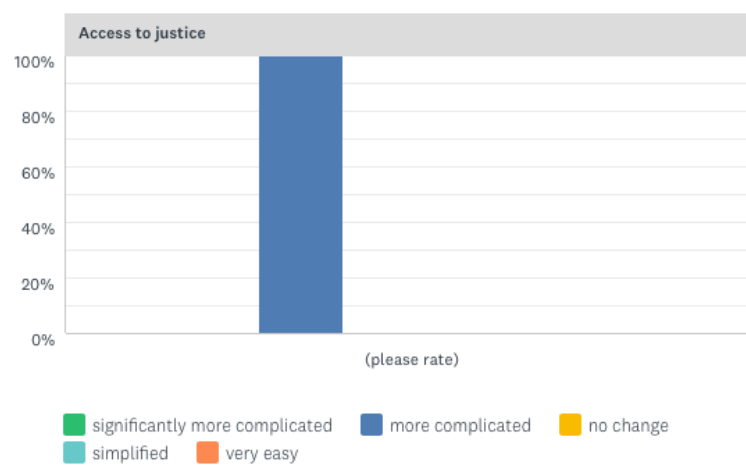


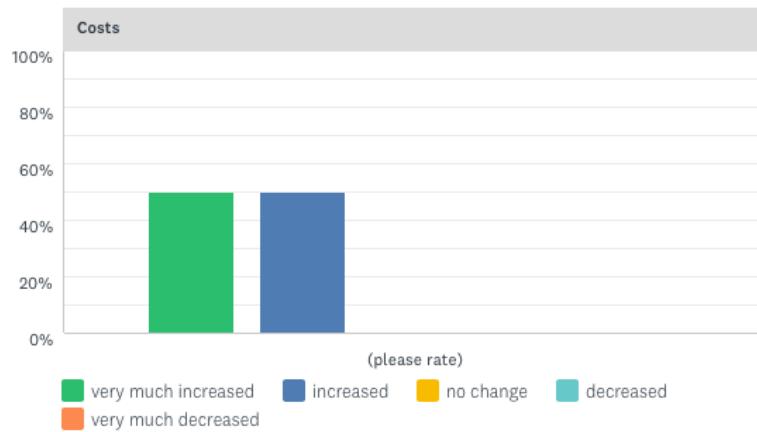
The respondents to this question take the view that access to justice is enhanced because it provides an avenue for claimants with the same claims to resolve their dispute. The pursuance of small claims is encouraged as the costs of bringing claims to the courts are shared by class members. Small claims can “piggy back” or benefit from the claim of another claimant who may have a larger amount to claim and has incurred a larger level of costs. Additionally, time is saved on instructing lawyers and making decisions as the group representative does this on behalf of the group.

Whilst these benefits to access to justice are achieved, the structure of the Danish class action mechanism has undermined the full achievement of access to justice. Fifty per cent of respondents highlight the negative financial effect that the opt-in process has on access to justice.

## If an opt-in regime is available, has it caused any particular problems in relation to

Answered: 2 Skipped: 2



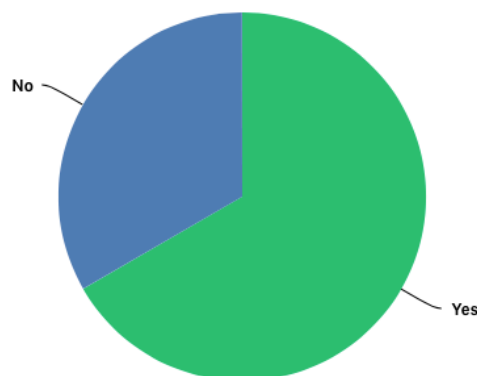


The stakeholder which represents both claimants and defendants highlights that the high costs of bringing proceedings narrows the scope and types of claims that can be brought via the class action mechanism. However, this consequence is not widespread across all areas. The stakeholder with experience of defendant work was of the view that the impact of increase in costs in state/government related cases is mitigated by the availability of public funding for the proceedings.

Notwithstanding the positive appreciation of the class action mechanism, 66.67% of stakeholders shared a concern that the class action mechanism creates a risk of abusive litigation.

### Are there risks of abusive litigation?

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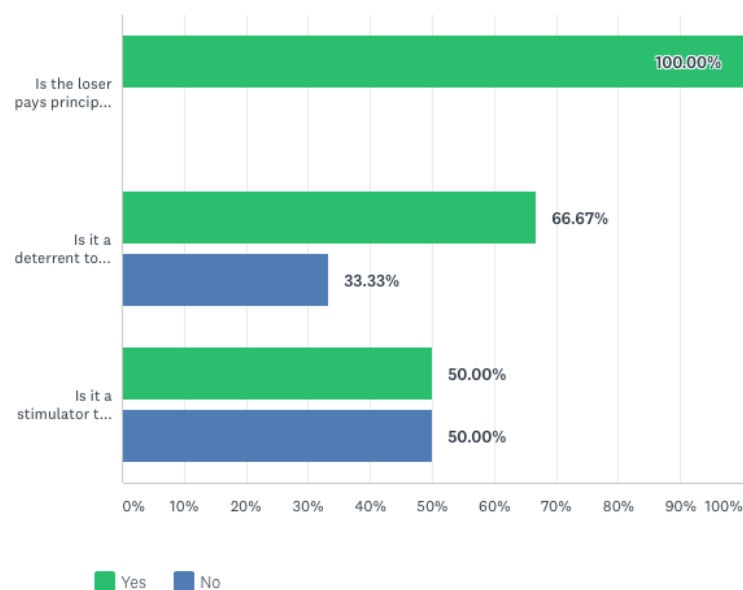
One stakeholder who represents defendants commented that, procedurally, the process to sign up to the group is easy and the minimum requirement of 2 individuals to form a class amplifies this abusive risk. However, whilst there is a risk, the data demonstrate that the manifestation of the risk is low. Of the 3 respondents who answered the question on instances of abusive litigation, 66.67% responded no instances of abusive litigation existed. The empirical data suggest that this may be a result of the impact of costs of proceedings.



As to the **costs of proceedings**, 2 out of 3 respondents reported that lawyers' fees are usually charged at hourly rates. However, it remains the case that the court decides costs and costs are usually awarded at 3% of the case value. The respondent with experience of both claimant and defendant work commented that this discourages claims being brought where the award amount is likely to be small. There is a correlation between the approach to costs and the answers to the questions on the **loser pays principle**.

Loser pays principle: the party that loses a collective redress action reimburses necessary legal costs borne by the winning party, subject to the conditions provided for in the relevant national law

Answered: 3 Skipped: 1



Two out of 3 respondents were of the view that the loser pays principle is a **deterrent to the bringing of a collective claim**. For the respondent with both defendant and claimant work experience, this is "due to the high costs involved" which "can be overwhelming to the defendant when facing a choice to fight a claim." However, this impact is not universal across all sectors. The stakeholder with experience of defendant work comments that in public law related cases, the costs of the case is manageable due to the availability of legal aid for such cases and therefore there is no deterrent effect.

The data suggest that the respondents see advantages of **relying on an injunctive order in a subsequent individual and collective action for damages**. The respondents cited the lowered costs involved in the subsequent follow-on action, the decrease in the length of follow-on proceedings and the ease of establishing liability in those cases.

As to avenues for information, the empirical data support the view that **sufficient information is available that a collective procedure exists** in Denmark. However, interviewee comments highlight a concern about the currency of such sources of information, particularly those on the internet. However, the empirical data suggest that for 2 out of 3 respondents, information **about ongoing collective proceedings** is unavailable.

However, one respondent who is a member of the judiciary comments that, as it concerns potential class members, the “court has to decide how the group representative is to inform the public. The court needs to approve the way the claimant advertises. There is a requirement of efficiency and practicality. In the interviewee's case, there were adverts on TV, cinema and newspapers about the intention to commence a class action.”

**General remarks** and recommendations proffered by Danish Interviewees are that the opt-out mechanism should be made available to all types of claimants and that courts should be granted a wide discretion to allow opt-out where a class/group of claimants can convince the court that opt-out is warranted in their case. This, in the respondent's view, would benefit claimants with small claims. Additionally, one stakeholder recommends the addition of fast track rules to the class action procedure. These fast track rules would require a defendant to submit his responses or arguments in a set time. Thereafter, the court will have to answer the formalities questions raised in a set time.

# ESTONIA

## I. Overview

There is no specific horizontal collective redress mechanism in the Estonian legal system. However, there are traditional rules of joinder and consolidation, and there is also a sectoral injunctive mechanism in consumer law.

General **rules on joinder of parties and consolidation of proceedings** are provided for in the Code of Administrative Court Procedure (in force since 1 January 2012) and in the Code of Civil Procedure.

The Code of Administrative Court Procedure (Sections 16 and 19) provides that an association of persons possesses standing as an applicant only in the cases provided in the law, and special rules apply for multiple parties. Unless the law provides otherwise, a decision is only binding on the parties to the action. There are provisions (Sections 22-23) on class proceedings in cases of more than 50 parties to a case. The persons who do not join the class proceeding can still bring a claim against the contested measure. There are also provisions (Section 34) on joint representation in cases with more than 50 parties.

The Code of Civil Procedure (in force 1 January 2006) does not contain provisions on class proceedings or other forms of collective redress, but provides (Section 3) that in certain cases exhaustively enumerated in law, the court can join proceedings in a civil matter concerning claims for the protection of interest of other persons or the interest of the public. Such situations include consumer protection and rights of immovable property owners, for example. The Code of Civil Procedure also permits joinder of claims in the interest of justice (Section 374).

Linking different cases is not a separate procedure but just a way of presenting individual cases jointly, which means that no special procedural rules apply. The decision cannot take special collective interests into account but is a way to facilitate the proceedings relating to many similar claims.

Regarding **sectoral mechanisms**, the Estonian Consumer Protection Agency (*Tarbijakaitseamet*), on behalf of the state, and consumer organisations in their own name may initiate civil procedures for the protection of the collective rights of consumers by demanding the non-application and the abolishment of unreasonable and harmful standard conditions in accordance with Directive 98/27/EC. The Consumer Protection Agency and consumer organisations have also been given the right by law to turn to court to prohibit unfair trading conditions.

This mechanism is solely injunctive. It is not possible to demand compensation through collective actions in Estonia. If the trader does not comply with the injunction issued by the Consumer Protection Board, a penalty payment may be imposed upon him.

Regarding **other sectors**, Estonia is a party to the Aarhus Convention and there are review procedures applicable to decisions on environmental information requests, but there are no special mechanisms for the public to challenge decisions by private actors that impact upon the environment or to

take special collective action. There is no specific collective redress mechanism in competition law.

**Alternative Dispute Resolution procedures** exist in Estonia. The Consumer Disputes Committee is a public body which deals with consumer complaints related to goods and services. There is also the Insurance Court of Arbitration which, contrary to the Consumer Disputes Committee, is a mandatory step for the insurer.

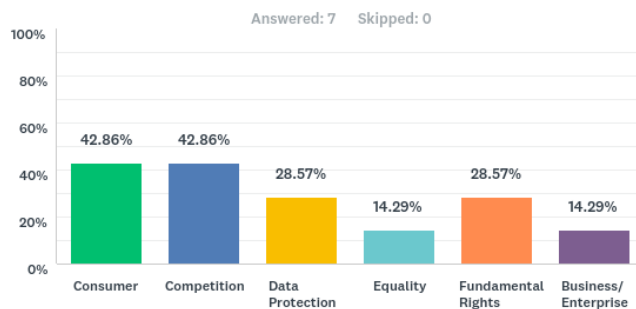
In its replies to the EU Green Paper, the Estonian government expressed support for class actions at an EU level for consumer disputes with a cross-border relevance. It also expressed its reluctance towards the opt-out model, as it is not compatible with many fundamental aspects of the Estonian procedural system.

However, the Estonian government noted that many recent consumer protection instruments were not yet fully in force so the need for additional, specific instruments could not yet be fully known (among existing instruments are Directive 2008/52/EC, Regulation 861/2007). The Estonian government expressed scepticism regarding new instruments with an important impact on member state domestic legal systems and pointed to the limits of the competence of the EU in this regard.

## II. Data

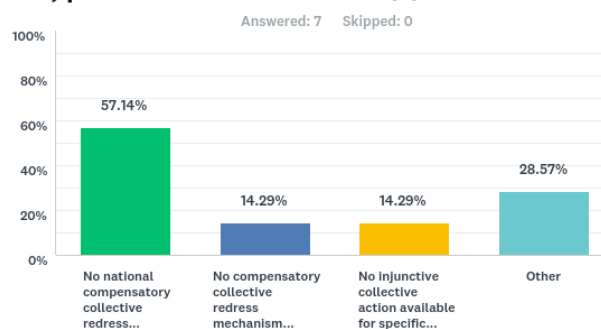
The following **empirical data** were gathered from three lawyers, two organisations (potentially) representing claimants, one administrative authority issuing injunctive orders in the consumer sector, and one academic.

Their fields of expertise cover the following areas:



Estonian law does not provide for a specific horizontal collective redress, as reflected by the personal experience of the respondents.

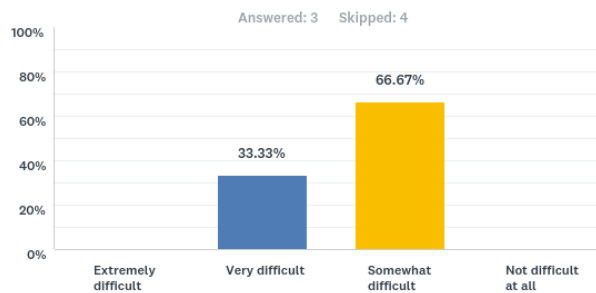
**If no is applicable, please select the reason(s) for not seeking collective redress:**



In the **absence of a specific horizontal collective redress mechanism** in Estonia, one respondent is able to draw conclusions from personal involvement, while the others base their answers on general knowledge of collective redress in other countries and comparison to existing mechanisms in Estonia.

Regarding the existing **sectoral injunctive mechanism** in consumer law, three respondents express one specific difficulty: seeking injunctive relief in **cross-border cases**.

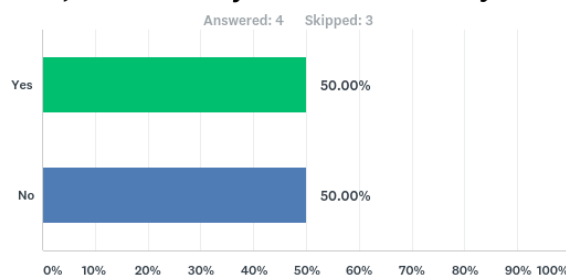
**How difficult do you find cross-border collective redress in injunctive cases?**



The difficulty in some cases seems to be finding an “equivalent” authority (with a similar role and mandate). As pointed out by a respondent, “the Estonian Consumer Protection Agency does not always find its best counterpart”. Nonetheless, the cooperation between different national authorities appears to be good, and the respondents seem dubious as to a potential improvement of the situation through collective redress. One of them in particular points to the potential difficulty of balancing the diverse national jurisdictional rules.

The empirical evidence demonstrates that stakeholders generally doubt the practical advantages of collective redress compared to the mechanisms already implemented in Estonia, in particular regarding **access to justice and fairness of proceedings**.

**In your opinion, is access to justice enhanced by collective redress?**



Out of the respondents who answered the question, three acknowledge the potential beneficial effect of collective redress on consumers with limited damage. Bringing a “small” individual claim might not be worth the time and effort for most consumers, and a collective redress mechanism could be useful in that sense. One respondent also mentions that private enforcement of competition law could benefit from collective redress.

This advantage remains nonetheless theoretical for the respondents, as four of them think the existing mechanisms in Estonia guarantee better access to justice. In particular, the impartiality and efficiency of public authorities are cited by three respondents as reasons for favouring the mechanisms already in place. One of them argues that “access to justice is better served by work

of agencies like the competition authority and the consumer protection agency. [...] In a collective action, the winners are law firms but it is questionable if such commercialisation of justice serves the interest of justice". Another mentions as well the necessity to **enhance consumers' information** on the existing mechanisms, which are currently neglected: "there are other mechanisms that can be used already and that are underused, so the main issue may be one of awareness of consumers rather than absence of a certain mechanism".

The **risk of abusive litigation** is a concern for half of the respondents to the question. They fear a financially driven selection of claims by law firms, where only high profile cases would get rightful attention. Fifty seven per cent of the respondents do not think collective actions ensure fairness of proceedings, and believe consumers' interests, and the public interest in general, are better protected by public agencies and administrative procedures.

The respondents who answered the question are doubtful as to the **efficiency of collective redress to obtain compensation**. One of them points out the potential difficulty for consumers to prove they are eligible for compensation, especially for small amounts, and adds they might not go to court when faced with a lengthy process and paperwork. For the stakeholder, collective redress is "not more effective than existing mechanisms" to obtain compensation.

The burden and time-consuming effect of the collective redress proceedings on the courts are an issue for 28% of the respondents. One respondent also mentions the probable necessity (and difficulty) of reorganising and/or creating public bodies to handle such a mechanism.

General remarks from the respondents point out to the current lack of interest from relevant Estonian bodies and ministries to implement a specific horizontal collective redress mechanism. No initiatives or legal reforms are under way, as the general perception is that existing mechanisms work well. As put by a stakeholder, collective redress "could be useful in connection with private enforcement of competition law but it is an alien instrument for Estonian law and there has not been any strong feeling that it is needed or should be introduced - no big shortcomings in the current system."

One respondent mentions as well that, even though Estonian consumer organisations have standing to bring claims, they do not do so in practice because of a lack of means and resources. The potential complexity and length of collective redress proceedings, and the risk of abusive litigation, are among the reasons why respondents would rather improve the existing mechanisms than implement new ones.

# FINLAND

## I. Overview

Finnish law does not provide for a specific collective redress mechanism. A sectoral mechanism is available in consumer law (injunctive and compensatory), and it is also possible to direct a “group complaint” to the Consumer Disputes Board, however its decisions are only recommendations.

In Finland, the **Class Action Act**<sup>5</sup> was enacted in 2007. Prior to this, the legislation for collective redress mechanism was under preparation for several years, since the early 1990s. However, the bill for the Class Action Act<sup>6</sup> was not passed until 2006, and was then enacted with minor modifications in October 2007. Overall, the Finnish Class Action Act is in many ways in accordance with the Commission Recommendation 2013/396/EU, with a few major differences, the most notable one being that the application of Class Action (ryhmäkante) is strictly limited to business-to-consumer relationships in the consumer sector. The scope of application is linked to the general jurisdiction of the Consumer Ombudsman under Finnish law (CAA Section 1), which is notably broader than in most EU member states.<sup>7</sup>

When the claim is processed, the competent court evaluates if multiple individuals have similar claims against a common defendant and if the use of class action is appropriate in consideration of the size of the party and the nature of the claims. If the court then determines that the case may be processed as a class action, the Consumer Ombudsman is notified. The Consumer Ombudsman is the designated and sole entity allowed to act as a representative and initiate class actions. They will assemble the class and present their claims to the court. An opt-in system is applied, and any member of the claimant class may leave the class at any time before the final proceeding. After this, leaving the class is only allowed with the defendant’s permission.

As to costs and funding, the Class Action Act does not provide any specific restrictions on the funding of class actions, or provisions on conditions or control of third party funding. The legal costs are distributed between the Consumer Ombudsman and the defendant as determined by the Judicial Procedure Act. Contingency fees are permitted in Finland. They are however not common, and the final fee must be “reasonable”.

Another form of collective redress in the Finnish legal system, also restricted to the consumer sector, is the **group complaint** (ryhmävalitus). This redress mechanism resembles the class action procedure, but is considered a more feasible option due to the fact that group complaints are directed to the Consumer Disputes Board (kuluttajariitalautakunta) instead of a general court. This makes the group complaint a more flexible and cost-efficient way of resolving consumer disputes compared to court proceedings. However, the Consumer Disputes Board lacks the legal authority of a court, and as such can only issue non-binding recommendations. The provisions for group complaint

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<sup>5</sup> Ryhmäkannelaki 13.4.2007/444

<sup>6</sup> Government Bill HE 154/2006

<sup>7</sup> Katja Lindroos- Joonas Huuhtanen: Country report -Finland at 344-345 in Study for the Fitness check of consumer and marketing law, European Union, May 2017.

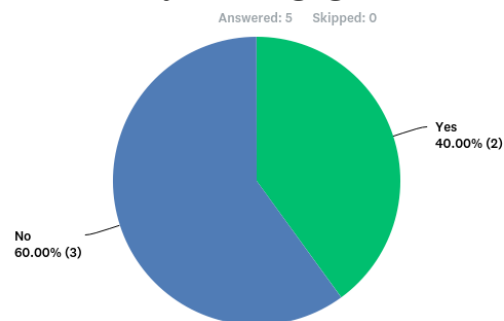
are included in the Consumer Disputes Board Act<sup>8</sup> and the Competition and Consumer Authority Act<sup>9</sup>.

Besides class action lawsuits and group complaints, the Finnish legal system also includes general provisions on joinder of claims, regulated by the Code of Judicial Procedure.<sup>10</sup> These provisions are not limited to B2C-relationships nor consumer sales.

## II. Data

The following **empirical data** were gathered from a lawyer, an organization representing defendants, a public authority representing claimants, a judge, and a consumer center. Their fields of expertise cover a large range of areas.

**Have you been involved in collective redress (as claimant, claimant lawyer, other) or are you envisaging such involvement?**



Forty per cent of the respondents were involved in multi-party proceedings, representing plaintiffs with similar cases. However, those cases were grouped together following traditional mechanisms of joinder or consolidation. The collective redress mechanism, introduced in 2007 in the area of consumer law, is very rarely used. Two respondents put forth the **restrictive scope of standing** as the main explanation for this. Only the Consumer Ombudsman can bring a collective claim. One respondent thinks collective redress is rarely used because it is seldom adapted to the situation, and the consumer and financial supervision authorities are sufficiently efficient to protect the interests of consumers. As put by a stakeholder, "it happens very seldom that there could be a potential case for collective redress. This is true when public authorities such as consumer and financial supervision authorities fulfill their duties properly and the legal system is well functioning".

All the respondents agree no frivolous or abusive litigations were brought since the bringing of the claim is exclusively done by the Consumer Ombudsman.

Another collective mechanism is available: group complaints can be directed to the Consumer Disputes Board. The Board issues recommendations that are not binding, but according to one stakeholder, its role is important and effective, and "this is one reason why cases rarely come to court proceedings".

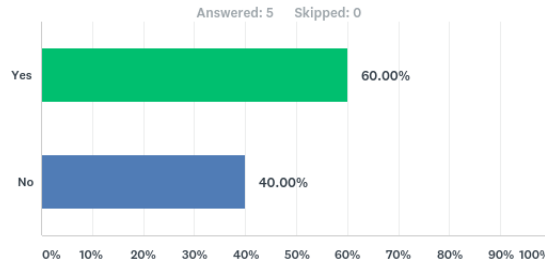
<sup>8</sup> Laki kuluttajariitalautakunnasta 12.1.2007/8

<sup>9</sup> Laki kilpailu- ja kuluttajavirastosta 30.11.2012/661

<sup>10</sup> Oikeudenkäymiskaari 1.1.1734/4



### In your opinion, is access to justice enhanced by collective redress?



Despite the rare use of collective redress in Finland, 60% of the stakeholders agree the availability of such mechanism enhances **access to justice**. However it remains theoretical as in practice, no cases are brought. Discussions and negotiations are favored, between the authorities and the infringer, and if the resolutions of the Board are not complied with, the Ombudsman can file a claim. According to one respondent, the mere possibility of a collective redress claim acts as a threat and incites business to behave.

Additional comments from the Finnish Competition and Consumer Authority follow the same reasoning. They explain collective redress is intended to be used as a last resort by the Consumer Ombudsman, when negotiations have been unsuccessful. For the Authority, collective redress is not appropriate to solve a dispute in the consumer/competition sector, in particular because of the **length and costs of the proceedings**. The availability of collective redress is therefore used as a "preventive deterrent", an incentive for companies to comply with the law. In cases of non-compliance, the mere threat of a possible collective claim acts as a "catalyst for negotiations": The risks of a class action in terms of public image and legal costs are an incentive for infringers to negotiate and settle. Thus, even though the Finnish Act on Class Actions is not used in practice, from the Consumer Ombudsman's perspective, it has served its purpose.

# FRANCE

## I. Overview

French law does not provide for a horizontal collective redress mechanism. However, sectoral mechanisms are implemented in consumer, competition and health law (compensatory), discrimination and environment law (injunctive and compensatory), and data protection law (injunctive).

Collective redress (as *action de groupe*) was introduced for consumer and competition law in the 2014 consumer law reforms (Loi n°2014-344 du 17 mars 2014 sur la consommation, also known as *Loi Hamon*). The group action mechanism was subsequently extended to health law (Law n° 2016-41 of 26 January 2016), and to discrimination, environment and data protection (Law n° 2016-1547 of 18 November 2016).

The *action de groupe* is available in the areas of consumer protection, competition, health, discrimination, environment and personal data. The entities allowed to bring a collective action must be duly registered, and have as their aim the protection of these specific rights. Associations can settle the case on behalf of the claimants, and judicial approval is required for any out of court settlement agreement.

Regarding available remedies, group actions in the areas of consumer protection and health law can only lead to compensatory relief. However the representative entity can intervene and ask the Court to apply, where necessary, interim measures. If the Court recognises a violation, it can order a cessation of the breach, if necessary under penalty in the case of non-compliance. In the other areas, both injunctive and compensatory reliefs are available, except for data protection violations where relief can only be injunctive.

Competition group actions are exclusively follow-on actions: they are authorised only after a final decision from the National Competition Authority, the European Commission or a court which has identified anticompetitive behaviour.

According to the French group action regime, which follows a multi-stage approach, a group is constituted via an opt-in system after the decision on liability has been reached. During the first stage of a collective action, the court decides on the publicity measures to be taken in order to inform the relevant consumers.

The judge who rules on liability also decides on difficulties which might arise during the implementation stage of the judgment. The association is deemed to be a creditor and can request interim and conservatory measures to compel the defaulting debtor to perform its obligation, if necessary under penalty in the case of non-compliance.

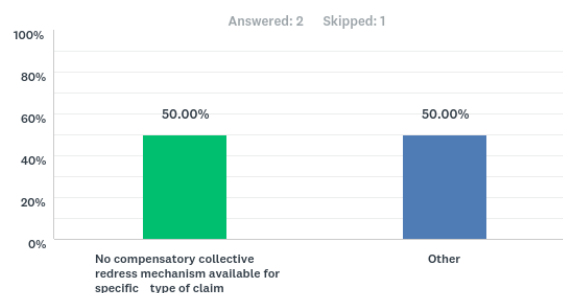
The court may order the losing party to pay the winning party's lawyer's and/or expert's fees (taking into consideration rules of equity and financial condition of the party). Court costs are usually borne by the losing party unless the judge decides otherwise. Contingency fees are prohibited. Result-based fees are only possible if they remain a complement to hourly-based fees.

As to funding, the current regime provides for public support of group action proceedings. To date, the associations bringing the claims have been funding the actions. The court can direct the defendant to provide the claimant association(s) with advance payments in respect of costs and expenses arising out of constitution of the group. There is no specific provision relating to third party funding.

## II. Data

The following **empirical data** were gathered from lawyers potentially representing defendants, and an organisation potentially representing defendants. The respondents have knowledge on the collective redress mechanisms implemented in France, but no direct involvement.

If no is applicable, please select the reason(s) for not seeking collective redress:



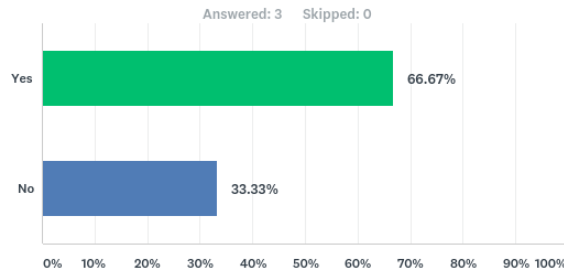
For most of the respondents, not being involved in collective redress is mostly an issue of timing. Collective redress is still a new mechanism in France. However, for one of the lawyers potentially representing defendants, not being involved in collective redress is related to an issue of **scope**. Their main area of practice is passenger rights, mostly in cases of accidents resulting in physical injuries. There is room for group actions in such cases, but the scope of the French mechanisms does not provide for them. The mechanism is sectoral and limited to consumer, competition, health, environment, data violation and discrimination. Passenger rights following an accident could potentially be covered by the consumer mechanism; however, compensation is limited to material damages. Physical and moral harm cannot be compensated.

Respondents are divided regarding the scope of **standing**. One respondent believes in strict requirements as to standing, and in the exclusion of “ad hoc” entities, as is the case in French law. They also think the scope of standing implemented in the new group actions in environment and health law is too broad. In environment matters, certification can be given for broad goals, for instance “defence of the economic interests” of the members of an association. Regarding discrimination, associations just need to self-declare, with no need for agreement or certification.

Another respondent agrees, mentioning the requirements for sufficient resources and years of existence are necessary to ensure efficient proceedings. They also mention the broad scope of standing in the sector of health law, where around 480 associations have standing to bring a claim. This is way more than the 15 associations accredited in consumer law, and it raises concern whether or not all these associations have sufficient experience or means to bring a claim.

On the other side, one respondent thinks the 'one year of existence' requirement for consumer matters limits the flexibility necessary in certain cases. Representative entities cannot be designated ad hoc, although ad hoc entities are particularly relevant in certain specific cases, such as those involving passenger rights in accident claims.

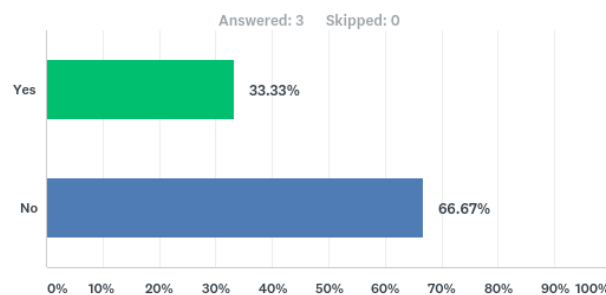
### In your opinion, is access to justice enhanced by collective redress?



The respondents agree **access to justice** is enhanced by collective redress, in particular in the cases where, on their own, consumers would have never brought an individual claim because of disproportionate costs regarding the actual damage. Nonetheless, one respondent mentions that in practice, access to justice is better guaranteed by other already existing mechanisms. In particular, in the sectors of health law and data protection, independent bodies exist, and are fast and efficient mechanisms. In health law, the Commission for Conciliation and Compensation (CCI) provides for a free, out-of-court, experts based mechanism, with the issuance of a recommendation that a court can enforce in case of non-compliance. In the sector of data protection, the National Commission on Informatics and Liberty (CNIL) ensures that the data privacy law is applied, warns non-compliers and can report them. The new collective redress mechanism in data protection cannot lead to compensation, thus its necessity is questioned regarding the existing efficiency of the CNIL.

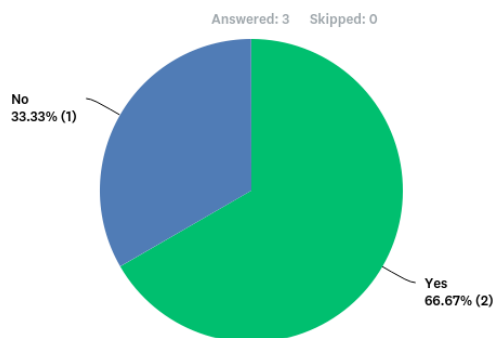
Another issue is raised regarding the sector of data protection. Although the collective redress mechanism cannot lead to the compensation of the damage, one condition of **admissibility** is to clearly define and prove a damage. The necessity of this condition is questioned by one of the respondents, who mentions as well that it creates an additional difficulty on the claimants' side, as damage in the area of data protection are difficult to demonstrate. Access to justice is thus not necessarily improved in that sector.

### Are collective actions an effective method to obtain compensation?



Because of the **length and complexity of the proceedings**, 67% of the respondents do not believe collective actions are an effective way to obtain compensation. Out of the ten actions brought in France since 2014, two were settled, and the others have their decision on admissibility still pending. The process is too long for 67% of the respondents, who believe other existing mechanisms are faster and more efficient, such as a conciliation before the CCI in the sector of health law. One respondent argues nonetheless that “the opt-in mechanism enhances the access to justice for consumers with limited damage (who would not have brought an individual claim otherwise) without impacting too significantly on the length of the proceedings”.

### Q53 Are there risks of abusive litigation?



The respondents are divided on the issue of **abusive litigation**. Even though in the current state of the French mechanism, no abusive or frivolous cases were brought, 67% of the respondents warn against the possibility of it. One of them raises concern about the representative entities bringing claims for the sake of media attention, and not in the interest of the victims.

Regarding **legal costs**, as explained by one of the stakeholders, “the courts have some discretion as to the extent of how the ‘loser pays principle’ is applied. In France, cases have yet to get to the second stage, where the court sets the quantum and nature of damages, and rules on fees and court costs. Thus, in theory, the loser pays principle may discourage frivolous and abusive actions, but the court decisions will really show it is applied in practice.”

In general remarks, the necessity to regulate the operation of **third-party litigation funding** is mentioned. One of the stakeholders points out that “the main abuses observed in the countries where class actions flourish are explained by poorly supervised funding conditions, leading to the excessive remuneration of third parties to the detriment of the victims”. Although not used in France, third party funding is unregulated, and it could lead to a profitable business for private entities if collective actions pick up more steam in the years to come.

One respondent highlights the necessity to further develop collective **Alternative Dispute Resolution** mechanisms, and to make it mandatory in the health sector. Mediation/conciliation is indeed a relevant method to settle health disputes, but professionals might be reluctant to agree to it because of the implied message it sends to the public about their fault/responsibility. Making conciliation mandatory would alleviate this reluctance.

The issue of **parallel proceedings** is not dealt with by the French collective redress mechanism. This raises questions for one of the respondents, as to how such a situation would be handled, and about the risk of contradictory

decisions between individual and collective proceedings relating to the same issue, or between different collective actions on the same issue.

Finally, collective redress in France would benefit from more clarity. The alleged 'common ground' mechanism implemented in 2016 features many exceptions, and does not apply to consumer law and health law. The sectoral approach to collective redress in France also implies a certain number of different laws on the topic, which adds to the complexity.

# GERMANY

## I. Overview

There is no horizontal collective redress mechanism in the German legal system beyond traditional civil procedure tools (stay, joinder, assignment). A sectoral mechanism simplifying mass compensation exists only for investor claims (test case proceedings followed by individual damages claims). Injunctive collective redress is provided for in competition and consumer law. Collective redress in cartel damages cases has been sought via assignment of claims to one entity, acting as claimant.

The German Code of Civil Procedure (ZPO)<sup>11</sup> focuses on two party claims and only contains rules on joinder of parties and stay or consolidation of proceedings. These are not specifically tailored to collective actions. Another 'traditional' method to pool individual claims against the same defendant is their assignment to a specific body that brings a lawsuit based on the bundled claims. This method has been tested in high value antitrust claims, but would in principle be available across sectors.

German law provides for sectoral collective redress mechanisms for competition law, consumer protection and investor claims which take a variety of forms. Mechanisms in consumer and competition law are mainly limited to representative actions claiming injunctions against anticompetitive behaviour or the violation of consumer law provisions or the skimming off of profits. Although consumer associations can also collect individual consumers' (damages) claims and bring these to court, collective proceedings are not so frequent due to the high financial risk and lack of incentives for the associations. Associations would rather bring single test cases which have a certain authority on similar claims brought in court, but no binding effect.

A proper collective redress regime exists only for mass investor claims. Practical needs led to the introduction of test case proceedings under the Capital Market Model Claims Act (KapMuG).<sup>12</sup> In cases involving identical issues of law or fact (e.g. wrong statements in a prospectus), the potential liability of the issuer of a financial product is decided upon in a test case while the other claims are stayed. The test case findings have binding effect on the individual cases. Whilst investor claims are ultimately aimed at compensation of damages, the KapMuG proceedings as such are limited to a declaratory judgment on certain preliminary questions. The amount of damages is to be determined in each individual case, once the test case has been successfully heard. Cases under the KapMuG require a minimum of 10 claimants to get model case proceedings started. Since 2012, the KapMuG proceedings have been supplemented by an opt-out settlement system.

As to costs, Germany follows the 'loser pays' principle. Depending on the sector, specific rules allow for splitting (KapMuG) or reimbursement of costs (UWG). Contingency fees for lawyers are not generally excluded but only

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<sup>11</sup> Code of Civil Procedure (*Zivilprozessordnung* (ZPO)) in its version of 5. December 2005 (BGBl. I p. 3202; 2006 I p. 431; 2007 I S. 1781), last amendment 10 October 2013 (BGBl. I p. 3786).

<sup>12</sup> Capital Markets Model Claims Act (*Kapitalanleger-Musterverfahrensgesetz* (KapMuG) in its version of 19 October 2012 (BGBl. I p. 2182), last amendment 4 July 2013 (BGBl. I p. 1981).

permissible under exceptional circumstances, e.g. if the victim lacks financial means and can only pursue his claim with a contingency fees arrangement.

Ongoing reform plans to introduce a general collective redress mechanism based on the model of KapMuG test case proceedings have been supported by associations but remain yet without any concrete legislative results.<sup>13</sup>

## II. Data

Participants in the empirical study (6) include lawyers and organisations representing claimants as well as an organisation representing defendants. They represent a variety of sectors, with most experience in **consumer law, mass cartel damages and investor claims**.

Two claimant representatives have significant experience litigating compensatory mass claims in the areas of competition law and capital market claims.

Stakeholders have reported **various problems in practice**.

It has been criticised that collective redress in Germany is **sectoral, limited in scope and not sufficiently developed**, even where a specific regime exists (KapMuG).

No specific collective redress system exists for **cartel damage claims**. In practice, the assignment model has been used to enable mass compensation (transfer of all individual claims to a single institution acting as claimant). While stakeholders confirm that this approach can work in principle, and standing is not an issue, it was noted that it presents various problems: (a) The validity of assignments needs to be assessed and the determination of the applicable law to this question and its assessment requires the use of experts to understand potential pitfalls. (b) When this model was used in practice, German courts have adopted a dogmatic and formalistic approach requiring i.a. financial resources to be in place at the time of assignment to secure all potential adverse cost risks linked with the proceedings before the latter even started. This procedural hurdle was considered disproportionate.

As to KapMuG proceedings for **investor claims**, it has been reported by the claimant side that the regime does not work satisfactorily in practice. Created to solve practical problems in the Telekom case, in which the court could not handle the sheer flood of claims, the most urgent objective for this Act was not to simplify proceedings for the claimants, but to assist the courts. From a claimant perspective, the regime it creates is not sufficiently developed and equilibrated for litigants as yet. Procedures would need to be streamlined and rendered more efficient. Requirements tailored for two party proceedings are not useful in collective cases. Examples that were given are the introduction of evidence into the proceedings and the number of hearing dates. Test case proceedings have also been questioned more generally, as they do not cover the determination of the individual amount of damages, which are subject to subsequent proceedings and hurdles in the post test case stage.

Civil procedure rules would need to be changed better to suit test case proceedings as many issues remain unaddressed and a new analysis of the KapMuG would be required to address problems that its application in practice

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<sup>13</sup> In June 2017 it was reported that no common position on the collective action mechanism proposed by the German Ministry of Justice could yet be found.

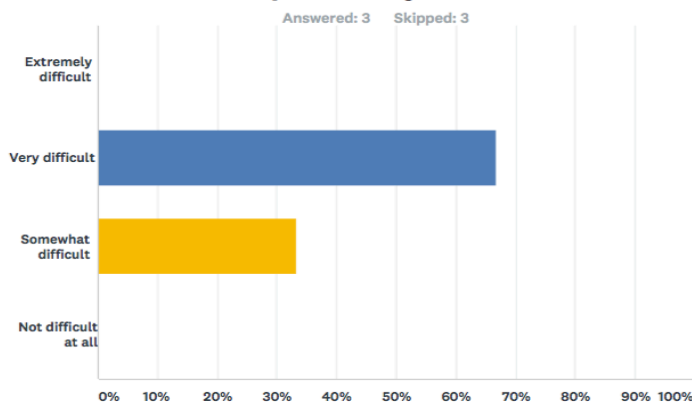


revealed. It was suggested that test case proceedings should be extended to potentially cover more issues and that the procedure needed to be simplified. The fact that whole sectors such as cartel damages claims are not regulated needs to be addressed. Horizontal regime in form of a settlement procedure or more elaborate test case proceedings have been suggested as a potential solution.

Three respondents answered the question whether **compensatory collective redress** was difficult and found it **somewhat to very difficult, especially in cross-border cases**. Reasons given were the sectoral nature of collective redress, i.e. the lack of a tailored system for certain sectors, as well as difficulties encountered with KapMuG proceedings.

As to **cross-border collective redress**, involvement of foreign claimants is in principle possible but it was reported by a claimant lawyer that it has proven complicated in KapMuG cases. The KapMuG procedure starts with the filing of claim in first instance, requiring compliance with all conditions of normal first instance proceedings. If legal capacity and standing of foreign claimants are contested, this can become problematic as foreign claimants face greater bureaucratic hurdles to prove their legal capacity and standing. Courts do not allow summary assessment of these issues but require a complete assessment. This does not simplify proceedings, but these difficulties might force foreign claimants to not join or withdraw claims, eventually hindering a proper cross-border claim. Where the assignment model was applied, the determination of the validity of assignments in a cross-border context was considered problematic.

**Q31 How difficult do you find cross-border collective redress in compensatory cases?**



Answer Choices	Responses
Extremely difficult	0.00% 0
Very difficult	66.67% 2
Somewhat difficult	33.33% 1
Not difficult at all	0.00% 0
<b>Total</b>	<b>3</b>

Respondents commented less on **injunctive relief** requested by consumer or business associations, and only one respondent stated that injunctive relief in mass claims would be **somewhat difficult** without stating any particular reasons. Standing is clearly defined and granted to associations.

According to the respondents, conditions for representative actions are clearly defined by law. An ad hoc designation of representative entities is possible, e.g. in cases where multiple claims are assigned to a specific entity who brings the case to court.

Respondents had less experience with **settlements**, but where a settlement was reached, no specific problems were reported.

**Litigation funding** is a recent phenomenon in Germany. Stakeholders actively involved in mass claims consider it as very important in Germany, because contingency fees are not allowed in principle. Therefore, there is a practical need for other options to facilitate bringing a claim.

Practical problems have not been reported. Interviewees stated that funders normally have no influence on the course of the proceedings, take no decisions and have no access to confidential documents. There are regular reporting obligations but there is no undue influence reported in practice. However, it was also stated that a risk remains, as there are no clear legal rules for litigation funding due to it being a relatively new phenomenon. It was therefore suggested that the creation of a legal framework is needed.

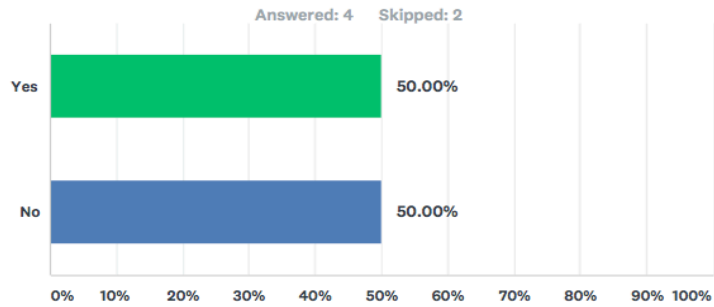
As to **information** about available or ongoing collective redress proceedings, no particular concerns were reported.

As to the **impact of collective redress on access to justice**, opinions on this question were split, as respondents remarked that the current system is not sufficiently developed to streamline proceedings and render them more efficient than two party proceedings.

This was explained with examples stemming from KapMuG proceedings: As the procedure starts with filing of the claim in first instance, compliance with all conditions of normal first instance proceedings is needed, which **does not simplify proceedings**. The rules in place for the introduction of evidence into the proceedings can lead to situations in which some evidence is precluded. Moreover, KapMuG test case proceedings do not in themselves lead to a grant of compensation. The determination of the amount of individual damages takes place in individual proceedings subsequent to the test case.

As to the impact of collective redress on access to justice, opinions were split. One respondent gave as reasons given for a "no" answer that the current regime is too lacunary to enhance access to justice.

### Q51 In your opinion, is access to justice enhanced by collective redress?



Answer Choices	Responses	
Yes	50.00%	2
No	50.00%	2
Total		4

As to the risks of **abusive litigation** in collective redress, respondents had different views. On the one hand, it was stated that the fear of US style litigation in Europe and related abuse is not justified: in the EU, there would rather be a **risk of under-enforcement**. However, it was acknowledged that an insufficiently developed regime for collective redress could enable loopholes and give rise to litigation tactics which can render proceedings more cumbersome or enable one-sided advantages.

On the other hand, it was stated that collective redress raises concern as it can have a significant impact on business' competitiveness. One respondent indicated concerns regarding the potentially high cost of collective redress procedures (quoting surveys with reference to US liability costs) and the considerable damage to the reputation of defendant companies (due to information measures undertaken in context with collective redress).

### Q53 Are there risks of abusive litigation?



Answer Choices	Responses	
Yes	50.00%	1
No	50.00%	1
Total		2

It has furthermore been commented upon by business representatives that it is doubtful whether collective redress instruments are suitable for the enforcement of European law, in particular in instances of mass or scattered damages with minor individual harm. It was considered impossible to create procedural instruments that motivate consumers to bring a claim and that ensure, at the same time, a high level of protection against abuse. Incentive mechanisms would be required that "invariably serve (economic) third party interests (lawyers, experts, organisations, etc), making collective redress vulnerable to abuse." Procedures aiming at skimming off illegally gained profits to the benefit of the public were therefore considered to be more suitable.

# GREECE

## I. Overview

There is no **general collective redress mechanism** in the Greek legal system. The provisions of the Greek Code of Civil Procedure (CCP) are focused on regular two party claims. The CCP contains rules on multi-party disputes, such as the joinder of parties, third party intervention and consolidation of proceedings.

The Greek legal system contains one sectoral mechanism in the area of Consumer Protection (Law 2251/1994). The mechanism grants standing to approved consumer associations to bring claims for injunctive and compensatory relief. Consumer associations have often made use of this sectoral collective redress mechanism in the area of banking and insurance law.

Whilst, there is no sectoral mechanism in place in the area of competition law, the wording of the provisions regarding consumer protection, makes it possible for a consumer association to bring a representative action against a producer or supplier who has violated competition law provisions. This possibility is theoretical, as Greek courts have not dealt with such a case so far. However, a representative action under consumer protection law might be ill-fitted for the particularities of competition law. Furthermore, in the field of unfair competition, a special legislative provision allows trade and industry associations, and chambers of commerce to bring an action before the courts seeking an injunction against traders for unfair competition. This procedural right does not qualify as a genuine form of collective redress, but it is a form of 'self-regulation' of the industry.

In the field of Labour Law, the CCP contains provisions which allow the limited participation of trade unions to court proceedings in relation to labour disputes. However, the limited procedural rights granted under these provisions do not qualify as a representative action and have a very limited scope.

The Greek legal system follows the '**loser pays**' principle. **Third Party funding** is not allowed. **Lawyers' fees** may be determined freely in a written agreement between parties.<sup>14</sup> When there is no written agreement between client and lawyer, the Lawyers' Code sets out the applicable legal fees, with reference to the type of the legal remedy sought and the amount of the claim. Greek law recognises **contingency fees**. Contingency fees cannot exceed 20% of the claim, when only one lawyer is involved, and 30%, when multiple lawyers are collaborating on the same case.<sup>15</sup> Contingency fees are very common in Greece. There is the potential to create an incentive of litigation as lawyers can also be remunerated on the basis of hourly rates.<sup>16</sup> There have been no concrete attempts for the introduction of a general collective redress mechanism, following the publication of the Commission Recommendation

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<sup>14</sup> Art. 58 of the Lawyers' Code (Law 4194/2013, Government Gazette A/208 27 September 2013)

<sup>15</sup> Art. 60 of the Lawyers' Code

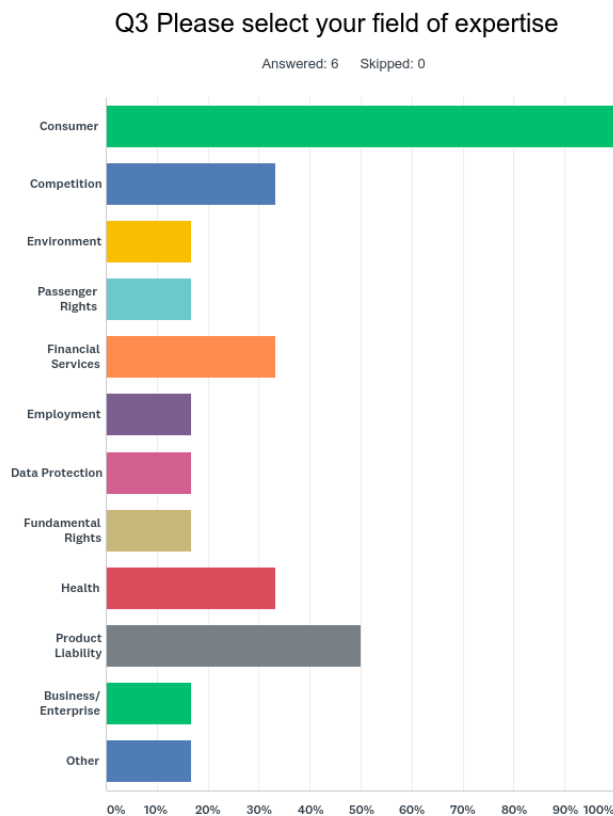
<sup>16</sup> Art. 59 of the Lawyers' Code

2013/396/EU (Commission Recommendation), as the Greek legislator does not seem to consider the introduction of collective redress mechanisms as a priority. However, there is academic debate and growing interest in the introduction of a 'pilot trial' mechanism.

## II. Data

The following empirical data were gathered from a total of 6 respondents. One lawyer representing defendants, one lawyer representing both defendants and claimants, two lawyers representing claimants, one legal adviser and a member of the Ministry of Public Administrator. Four out of six respondents were involved in collective redress as a claimant, a claimant lawyer or envisaging involvement as one of these.

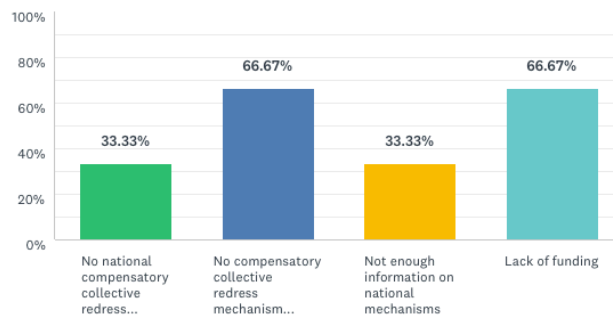
The respondents' fields of expertise cover the following areas:



The empirical data demonstrate that there are financial and legal impediments to the full utilisation of collective redress procedures in Greece. Greek law does not provide for **a specific horizontal collective redress mechanism**, as reflected by the personal experience of the respondents.

If no is applicable, please select the reason(s) for not seeking collective redress:

Answered: 3 Skipped: 3



As for the lack of **funding**, one respondent commented in interview that the funding restriction upon associations (i.e that they can only rely on membership fees to fund their claims) is a predominant factor in their decision not to resolve disputes via collective procedures. Pro-bono representation of consumer associations in collective procedures frequently occurs due to the lack of funding. As it concerns other sources of funding, the data do not demonstrate a predominant factor which is of a widespread concern amongst all respondents. One sixth (16.67%) of total respondents were of the view that the existence of **contingency fees** affected their decision whether to bring claims via collective procedures. This respondent was of the view that whilst the code governing lawyers' fees allowed lawyers and clients freedom to agree a fee, contingency fees are not possible where an injunctive claim also includes a request for moral damages. Additionally, a legal practitioner representing claimants was of the view that third party funding should be allowed for collective claims.

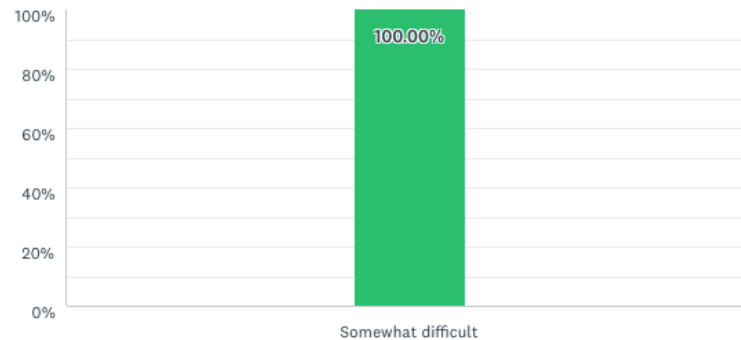
Additionally, the empirical data indicate that stakeholders find the absence of a national compensatory collective redress mechanism or of a sector specific compensatory collective mechanism as reasons for their decision(s) not to resolve mass claims via collective procedures.

Whilst injunctive relief is available and sought in consumer law, the empirical data suggest that there are no predominant motivating factor(s) for the respondents' decisions to use collective redress procedures to gain an injunction. Respondents cited the speed of proceedings, costs, bargaining power/likelihood of success, efficiency of an injunction and the res judicata effect of the judgement on other potential defendants who may be committing the same behaviour for the choice to pursue collective procedures for injunctive relief.

However, 33.37% of the total respondents found some **difficulty in gaining injunctive relief** in consumer law cases.

## How difficult have you found gaining injunctive order?

Answered: 2 Skipped: 4



Interviewees highlighted a mix of procedural and evidentiary issues for this difficulty. Procedurally, the respondent who represents claimants commented that the short time limit (6 months) in which a claim needs to be brought is a concern. Similarly, the respondent was of the view that the high legal threshold needed to be satisfied for a claimant's claim to be accepted by the court adds difficulty to the collective procedure. In some cases, technical experts are required to establish the requisite evidence to substantiate the claimant's claim and this adds an additional burden.

As for **settlements**, the empirical data suggest that settlements are not a common part of the litigation culture. Of the 3 respondents who answered the settlement question, 66.67% resolved 0-29% of their claims via settlement. However, it is not clear from the data whether the range of 0-29% was selected because no settlements occurred. Similarly, the data do not clarify whether settlements were pursued/reached before the start of legal action or settlements reached following suspension of proceedings. The organisation which represents claimants or potential claimants was of the view that a settlement culture does not exist in Greece.

The empirical data indicate that there is some ambiguity in respondents' understanding of the **conditions for standing** to bring representative actions. Of the 83.33% of respondents who answered the question on standing in representative actions, 50% of these respondents were not clear as to whether the conditions for standing were laid out in case law.

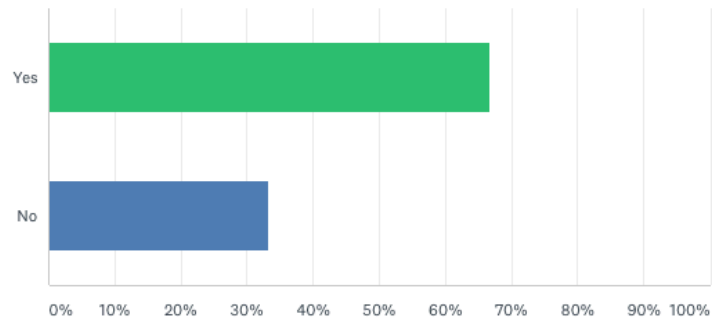
The **possibility to seek an injunction and compensation in a single action** in consumer law collective proceedings is a common experience shared by 33.33% of the total respondents. However, such compensation is of a punitive or extra-compensatory kind.



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## Are punitive or extra-compensatory damages available in your jurisdiction?

Answered: 3 Skipped: 3



Whilst punitive or extra compensatory damages were available, the empirical data suggest that stakeholders are of the view that such damages do not encourage disproportionate overcompensation. The rationale for this view seems to be that a percentage of these damages go to the state when awarded. Furthermore, the quantum of damages tends to be very small when moral damages have been awarded. In one case, 50,000 euros was awarded for a bank's illegal conduct which occurred consistently over a period of 10 years.

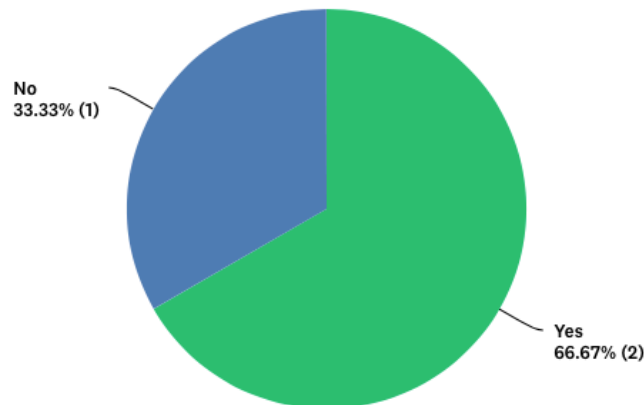
Regarding the interaction between **an injunctive order and subsequent individual damages claims**, two respondents are of the view that an injunctive order can be relied upon in subsequent individual damages claims. Interviewees have highlighted both an advantage and a disadvantage of such possibility. An advantage is that the injunctive order establishes a presumption of infringement/liability on the part of the defendant. To this extent, one respondent was of the view that collective mechanisms were an effective method to obtain compensation. However, this advantage is not certain in every case; there is the possibility that individual courts might have different opinions as each court might have a different interpretation to another. Furthermore, in subsequent individual claims, compensation can be denied if the courts determine that claimants are not in need of damages when their claims are made.

Of the 6 respondents, 1 (16.67%) found **cross border collective redress** very difficult, 3 (50%) did not have experience of cross border collective redress and 2 (33.33%) did not answer the questions on cross border issues. The single respondent with experience did not elucidate the reasons for their choice.

Whilst there are disadvantages of the current regime, two stakeholders recognise the current benefits of the existing regime for collective redress.

## Do collective actions ensure fairness of proceedings?

Answered: 3 Skipped: 3



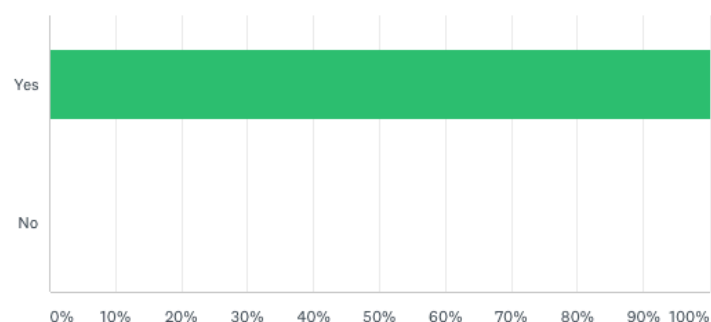
In their view, **fairness of proceedings** is ensured through the equality of entitlements in proceedings. Both parties have the same right (and time) to respond to arguments. Furthermore, a defendant needs to be informed 15 days after filing a lawsuit and the full hearing needs to take place within 2 months of filing.

Similarly, the **risk of abusive litigation** is not a concern for 33.33% of respondents. Claimant stakeholders cite the limited number of entities allowed to bring claims as a basis for their response.

The perceived benefits of the current regime also include an economic benefit.

## Do national collective redress mechanisms enhance consumer confidence/trust/protection?

Answered: 2 Skipped: 4

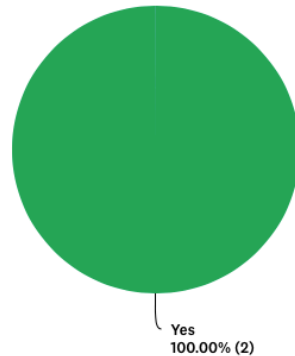


This has led claimant stakeholders to take the view that the collective injunctive procedure has increased consumer confidence as millions of euros have been returned to consumers.

The empirical data suggest that 33.33% of the total respondents view Greek collective redress mechanisms as generally **enhancing access to justice**.

In your opinion, is access to justice enhanced by collective redress?

Answered: 2 Skipped: 4



For a claimant stakeholder, there is a procedural advantage of the collective procedure in consumer cases. In these types of claims, judges are not confined to the claim as stipulated in the lawsuit. In a collective claim, a judge can go further and is given more room to decide how law arguments are stated.

However, the response rate to the questions of fairness, access to justice and risk of abusive litigation undermines the uniformity of the positive experience to all stakeholders. Interview data from a legal practitioner representing claimants show that access to justice can be more difficult for consumers with small claims. This stakeholder is of the view that access to justice is getting more expensive each year and this is further exacerbated by an absence of collective ADR.

As to **cost of proceedings**, 33.33% of respondents were of the view that court fees were not a deterrent to the bringing of a collective claim. In the view of a legal practitioner representing claimants, court fees are very low with an average court fee of between 600-1000 euros.

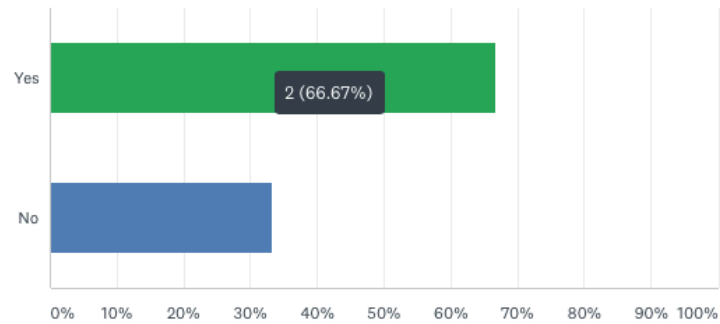
Similarly, the **loser pays principle** was not a deterrent to the bringing of a collective claim for 33.33% of the respondents. A legal practitioner representing claimants was of the view that the "loser only pays low costs relative to the real expense incurred and the court applies a liberal interpretation of the principle and obliges the loser to pay minimal costs." However, the respondent stressed that, in frivolous claims, a court may decide that no costs are to be paid.

One third (33.33%) of total respondents were of the view **that sufficient information on collective redress mechanisms** is available in Greece. Information is available via websites of consumer associations. However, these websites contained general content. Information is not available via a National Registry of collective actions as no such registry exists. As to ongoing collective proceedings, consumer associations are required to communicate an existing action to its members.

The issues identified above are linked to stakeholders' answers that collective procedures in Greece can be improved.

Are there any aspects of the collective injunctive action procedure in your jurisdiction which could be improved?

Answered: 3 Skipped: 3



Stakeholder suggestions range from the creation of an opt-in/opt-out procedure (particularly an opt-out type of action for consumers), reformation of the purpose and scope of moral damages and the creation of a general compensatory procedure and/or a sectoral procedure for consumer law cases.

**General comments** from claimant stakeholders include an expansion of the current avenues of funding for consumer claims and the creation of a register of defendants who comply with orders and/or implement rulings.

# HUNGARY

## I. Overview

Hungarian law does not provide for a specific horizontal collective redress mechanism. However, several **sectoral mechanisms** are in place in the following areas: unfair contract terms in consumer contracts (injunctive), consumer protection rules (injunctive and compensatory), competition law (injunctive and compensatory), financial services (injunctive and compensatory), environment (injunctive), employment (injunctive).

The current Civil Procedure Act will be repealed on 1 January 2018. The new Code of Civil Procedure will contain special procedural rules for collective actions conducted in public interest and will also create a new category of actions, group actions where the public interest element is not required. The mechanism will be sectoral (injunctive and compensatory) for claims arising from consumer contracts, from health damages caused by unforeseeable environmental incidents, and in labour cases.

Hungary also has **two out-of-court ADR schemes** specifically designed for the resolution of consumer to business disputes.

The landscape for collective actions in Hungary is very diverse. The current Act on Civil Procedure (CPA) does not contain special rules for collective actions, however there are several acts dealing with collective actions. Given that the procedures under the different acts contain many similarities but also have subtle differences, the report deals with each action separately, grouping them by legal acts.

It should also be noted that some of these options have never been used in practice (competition mechanism), or have been used very rarely (for example, once for the collective ADR mechanism).

The latter two mechanisms (environment and employment) are non-standard collective actions that have special features compared to the rest, but are nevertheless considered to be collective actions in Hungary. In addition, the mechanism under Act XXXVIII of 2014 (financial services) was created to address a special situation, it has been an ad hoc scheme that ceased to exist and that has carried several special features compared to the permanent mechanisms.

Where compensation is available (consumer, competition, financial services), if the amount of the claim can be clearly defined, then the compensatory mechanism follows an opt-in system. Affected consumers can join the claim up until the closure of the hearing preceding the first instance judgment. Otherwise, the court issues a decision on liability, and compensation relies on the initiative of each individual consumer. Regarding injunctive mechanisms in the other sectors, there is no opting in or out: the claim is made in the general public interest.

Regarding costs and funding, there are no special rules on funding for collective actions. Third party funding is neither prohibited nor regulated, but it has not yet been used in practice. The 'loser pays' principle applies, however consumer protection organizations, the public prosecutor and the Hungarian National Bank are exempted from paying court fees. Punitive damages are not available.

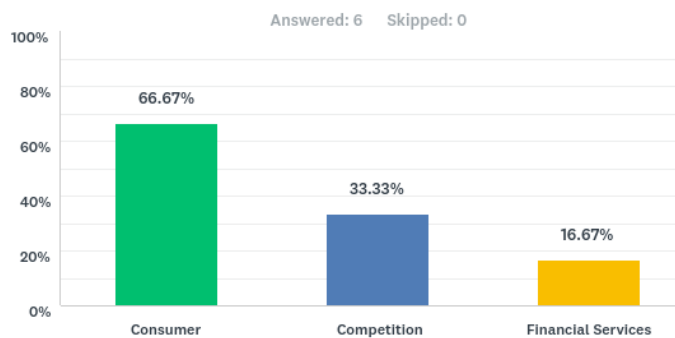
In terms of their overall practical effect, compensatory actions that would have the most potential to change the behaviour of a business are very rare in practice; most cases in practice arose in regard to the fairness of contract terms in contracts denominated in foreign currency.

In the absence of special rules for collective actions, the general rules in the CPA are often difficult to apply. Some procedural rules can be found in substantive laws implementing EU law, but this reform has not followed the creation of the necessary body of procedural rules. It seems that any changes were ad hoc, to address current problems without a clear plan and systematic approach.

## II. Data

The following **empirical data** were gathered from three lawyers, one organisation (potentially) representing defendants, one public authority representing claimants or potential claimants, and one administrative authority issuing injunctive orders.

Their fields of expertise cover the following areas:



Have you been involved in collective redress (as claimant, claimant lawyer, other) or are you envisaging such involvement?

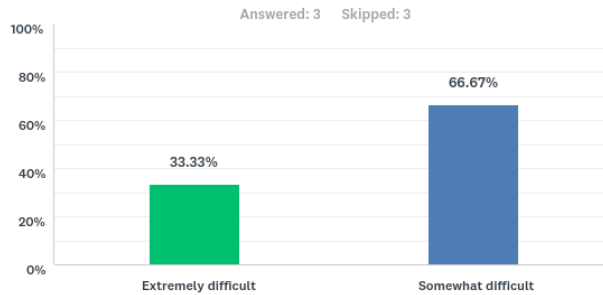


Half of the respondents have been involved in collective redress. They all mention cases regarding unfair contractual terms, which seems to be the main area where collective redress is used in Hungary. None of them were involved in a settlement or ADR mechanism, as it is not possible to settle when unfair contractual terms are being challenged. However, for other violations of consumer protection rules, a settlement is possible.

The reasons cited by the respondents for not having been involved are, for lawyers, the absence of compensatory collective redress mechanisms in specific sectors and the lack of information on collective redress and, for consumer organisations, the lack of resources (particularly human capacity).

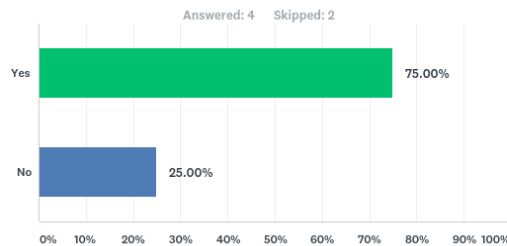
**Gaining compensatory collective redress** appears complicated. Sixty seven per cent of the respondents would describe the process as “somewhat difficult”, while it is “extremely difficult” for 33% of them.

**How difficult have you found gaining compensatory redress in mass claims?**



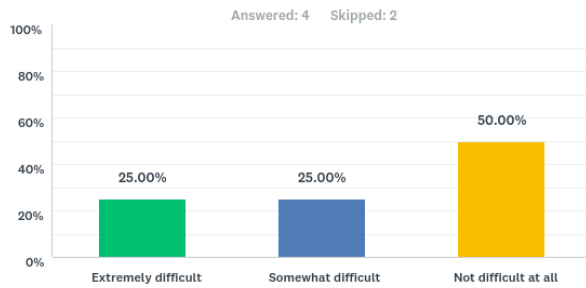
The main difficulty seems to arise from the procedural requirements. For a compensatory claim to be admissible, a group of affected consumers must be clearly identified, along with the amount of their damages. Most of the collective redress cases in Hungary regard unfair contractual terms, and proving that the infringement impacts several consumers, as well as the exact amount of damages, is challenging as the problematic contractual terms might not be relevant for all the consumers. If the affected consumers and the amount of damages cannot be identified, then the redress can only be injunctive. It appears injunctive redress is favoured as an easier way to establish liability, with the possibility to claim individual compensation afterwards. One of the respondents also states that authorities favour administrative procedure as a faster way to secure injunctions and penalties against infringing entities (leaving compensation to individual claims as well).

**Are collective actions an effective method to obtain compensation?**



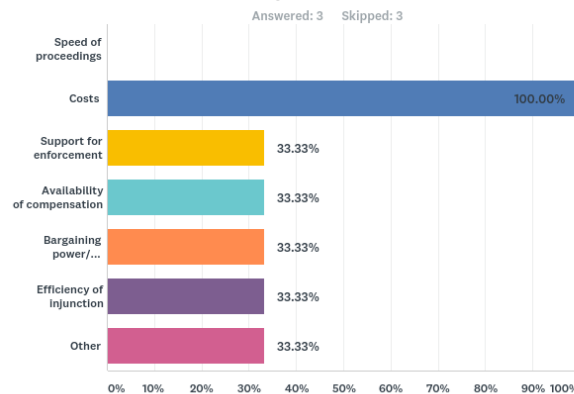
When asked generally, 75% of the respondents agree collective redress is, in theory, an effective way of obtaining compensation. However they do not refer to the compensatory collective mechanism, but to the possibility of bringing an individual compensation claim based on an injunction. Even then, it seems that in practice, very few consumers actually follow up with an individual claim. As pointed out by a respondent, “it would be effective but the problem is that consumers do not go and ask for compensation after the ruling, while it would be easy. In practice, it is effective for the consumers who do it”.

## How difficult have you found gaining injunctive order?



**Injunctive orders** seem to be less difficult to obtain. Half of the stakeholders who answered the question agree it is “not difficult at all”, and mention Hungarian jurisprudence which supports the claims for injunctions. The process is described as straightforward, with no need to identify individual private interests or defined amount of damages.

## Which factor(s) influenced your decision to use collective procedures to gain an injunction?



**Costs** are a factor which influenced all respondents involved in collective redress to use such a mechanism to obtain injunctive relief. Consumers associations are funded by the government and are exempted from court fees. In general, the injunctive proceeding is described as efficient, and a good basis for subsequent individual enforcement (even though not really used in practice). The length of the proceedings seems to be a setback for some respondents.

One respondent points out the “social/societal effects” of collective redress as the main “advantage and motivation” to use such mechanism. “Changing, or at least questioning, existing practices, unfair behaviour and systems, through the publication of decisions, and the broadcasting/advertising power” of consumer associations, is an effective incentive for businesses to behave.

All the respondents who answered the question believe collective redress enhances **access to justice**, especially regarding claims which would not be brought to court individually, because of the limited amount of damages, or because the consumer is not aware of the unfairness of a contractual term for instance. One respondent calls collective redress an “important tool in consumer cases in order to have a level playing field and enforce consumer rights. [...] The deterrent power makes it an efficient tool. In addition, collective redress cases have wide visibility and publicity”.



Seventy five per cent of the respondents think **fairness of proceedings** is ensured, with no risks of abusive litigation and limited burden on the court.

Hungary has two out-of-court **ADR** schemes specifically designed for the resolution of consumer to business disputes, but it appears that in practice, most of the cases regard unfair contractual terms, and settlements before or during the civil procedure are not available in that sector. One respondent points out that, where available, ADR mechanisms are not sought, as the injunctive procedure is efficient, and a good basis for individual claims.

Regarding **cross-border cases**, there are no restrictions as to the participations of foreign claimants, and for consumer claims, standing is given to any consumer protection organization established in the EEA registered with the EU Commission. However, all past collective redress cases in Hungary are domestic, and one respondent raises potential issues regarding the enforcement of a decision in a cross-border case.

Regarding **information**, even though 75% of the respondents agree sufficient information on collective redress is available, they mention nonetheless the need for more effort in that area. In particular, following an injunction, infringing entities must publish the court's decision in the newspaper and on their website. Potentially affected consumers could benefit from a more "targeted" approach, so as to be informed of the possibility to be compensated. One respondent argues that "if companies had to notify all concerned consumers, that would probably overburden them, but it would help". The same remark is made regarding consumer trust: the availability of collective redress might not impact much on consumer confidence, as the majority of the cases are not "visible" to them (cases about unfair contractual terms that consumers may not be aware of). Nevertheless, the visibility and publicity surrounding collective redress is cited as effectively deterring future violations from business entities.

General remarks from the stakeholders indicate that the availability of collective redress impacts positively on the market. The injunctive mechanism is quite efficient, and opens a way for consumers to claim individual compensation. This creates an incentive for business entities to remain conscious of their practices. One respondent mentions a case involving a telecommunication company that led to changes in the law, bringing additional protection to consumers. The general consumers' interest thus seems to benefit from the injunctive collective redress mechanism. Regarding compensation, the difficulties to bring a collective compensatory claim, along with the very rare occurrence of follow on individual claim, means that access to compensation for consumers appears to remain theoretical in Hungary.

# IRELAND

## I. Overview

There is no dedicated mechanism for bringing collective claims in Ireland. Rather, mass claims are dealt with under the general rules of civil procedure which only allow for collective claims in very limited circumstances. These take the form of representative actions. Test cases have also been used to deal with instances where a number of individual claims are brought against a defendant alleging essentially the same harm.

In 2005 the Irish Law Reform Commission conducted a review of the law regarding multi-party litigation and published a report recommending that a formal procedural structure for collective redress be established. However, this is yet to be acted upon by the legislature and reform in this area is not a current legislative priority.

In a representative action, a person can initiate proceedings on behalf of a number of people, however the application of this mechanism is, in practice, very limited. The representative must be authorized by each member of the class, and the claim can only lead to an injunction. The members of the group on whose behalf the representative action is conducted must have the "same interest". This requirement is applied restrictively by the courts, namely the interest of the different members must be identical. The judgment only binds those represented by the representative, namely only those who authorized the representative to conduct the litigation on their behalf. Public funding is not allowed for representative actions, which makes it difficult to initiate them since multi-party litigations usually entail a heavy financial burden. Lastly, there are no detailed procedural rules, although they would be needed to manage complex proceedings such as multi-party actions.

Test cases are used as an informal means to conduct multi-party litigation and are, in practice, more commonly used than representative actions. A test case may be used at the discretion of the court when several claims are brought by different individuals which arise out of the same facts or circumstances. A single claim or a small number of joined claims will be allowed to go forward to trial while the others are stayed pending the outcome. The judgment in the leading (test) case then serves as a benchmark for the remaining, pending cases.

In general, third party funding is prohibited. The loser pays principle applies, and recovery of punitive damages is rare and limited (usually on public policy grounds).

## II. Data

Information on collective redress in Ireland was gathered from three lawyers, one representing defendants and two both claimants and defendants in a broad range of disciplines including financial services, consumer law, product liability and competition.

The **limited availability of collective redress** in Ireland was reflected in the answers of the participants. None of those surveyed had any experience of bringing a class action and only one of those surveyed had experience of defending an action, albeit in proceedings being conducted overseas. Their answers were therefore restricted to commenting on collective redress in general terms and on the prospect for future development in this area in Ireland.

One issue which came across clearly from the participants' answers was the **lack of available funding**, which impacts the ability of individuals to bring group claims, regardless of the absence of a dedicated collective redress system. Two thirds of the participants considered that the current prohibition on third-party funding presents a significant barrier to bringing collective claims in Ireland and is a position which they considered should be revisited. The only participant who commented on lawyers' fees stated that it was common for lawyers to enter into contingent fee agreements with clients, although there was no specific indication that this would be something widely available in group claims. It is clear from the legal profession, that were Ireland to institute a mechanism for collective redress it would not in practice lead to increased access to justice for victims in mass harm situations unless accompanied by reform of the rules on litigation funding.

The lack of collective actions in Ireland is not to say that there are no mass harm events which may give rise to such proceedings. Participants identified several, recent, events which may form the basis of collective litigation, such as the miss-selling of financial products and homeowners whose houses have been affected by pyrite contamination. One participant was of the view that victims would benefit from the, presumably, lower costs of a dedicated procedural mechanism and that such a mechanism would increase the numbers of individuals seeking redress. However, despite these events there has been no great pressure towards establishing a formal collective redress mechanism. Rather, the response to mass harm situations has often been for the Government to establish a collective compensation scheme for those who have been affected, examples of which include those for the survivors of symphysiotomy and victims of institutional abuse.

The existing mechanisms do not seem to be a replacement to a structured collective redress mechanism. Although these mechanisms can be used as a means to conduct multi-party litigation, they are nevertheless **far from the type of procedure envisaged by the Commission in the 2013 Recommendation**.

# ITALY

## I. Overview

There is no general collective redress procedure in Italy, instead, the ordinary civil procedure rules in respect of joinder are used to obtain redress in cases where there are multiple victims. In addition, there is a sector specific collective redress regime for consumer cases as well as a specific action in administrative proceedings.

Over the last twenty years or so the typical route used by plaintiffs to obtain compensation in mass harm situations was to join criminal proceedings against the defendants. Despite the introduction of class actions, claimants continue to lodge damage claims in criminal actions and this, along with the other traditional methods remain the preferred method of obtaining redress.

### Consumer Law

The collective regime in consumer cases is set out under Arts 139 – 140*bis* of the Italian Consumer Code (ICC). Principally there are two distinct types of action that can be brought: the *azione inibitoria*, or injunctive action (Arts 139-140 ICC); and the *azione di classe* or compensatory action (Art 140*bis* ICC). The *azione inibitoria* allows certified consumer organisations to bring an action seeking to prohibit conduct in defence of the interests of consumers in general. On the other hand, the *azione di classe* is more limited in scope and can only be brought for a) breach of contract; b) unfair or anticompetitive commercial practice; and c) product or service liability.

With respect to the *azione inibitoria* **standing** is granted to:

- The associations of consumers and users registered on the official register pursuant to Article 137, to act to protect the collective interests of consumers and users.
- Independent Italian public organisations and organisations recognised in another Member State of the European Union, registered on the list of entities entitled to take action for an injunction to protect the collective interests of consumers, published in the EU Official Journal, which is damaging to consumers in that country, affecting all or part of a Member State.

With respect to the *azione di classe* **standing** is granted to:

- each member of the class
- associations and committees to which the class has granted the power to act.

At the first stage in the proceedings the court will consider whether the proposed representative has a conflict of interest and whether it is able to adequately represent the interests of the class.

Collective proceedings follow an **opt-in** model which is regarded as protecting the due process rights of the participants. At the first hearing, the court prescribes a time limit, not exceeding 120 days during which participants may opt-in.

Obtaining **funding** for collective proceedings is one of the biggest challenges in bringing collective proceedings in Italy, the burden of funding substantially falls on the claimant organisation itself. Whilst third party funding is allowed it is almost never used, and the consumer organisations themselves are poorly funded. The only other funding option is through the state which will provide funding to plaintiffs whose income falls below a set threshold.

Plaintiffs may obtain be assisted by entering into a success fee agreement with their lawyers, which are permitted. However, since lawyers are prevented from entering into a fully conditional agreement it is impossible to fully fund a claim this way.

### **Administrative Law**

Italian law also provides for a collective administrative proceeding. The action, introduced by the Legislative Decree 20 December 2009 no. 198, is aimed at remedying inefficiencies in public administration and ensuring public bodies' compliance with the standards set out for them. Persons with a direct interest and associations and committees representing them have **standing** to bring an action. No compensation is available but public bodies are bound to comply with any judgment.

The key inconsistencies with the Recommendation are:

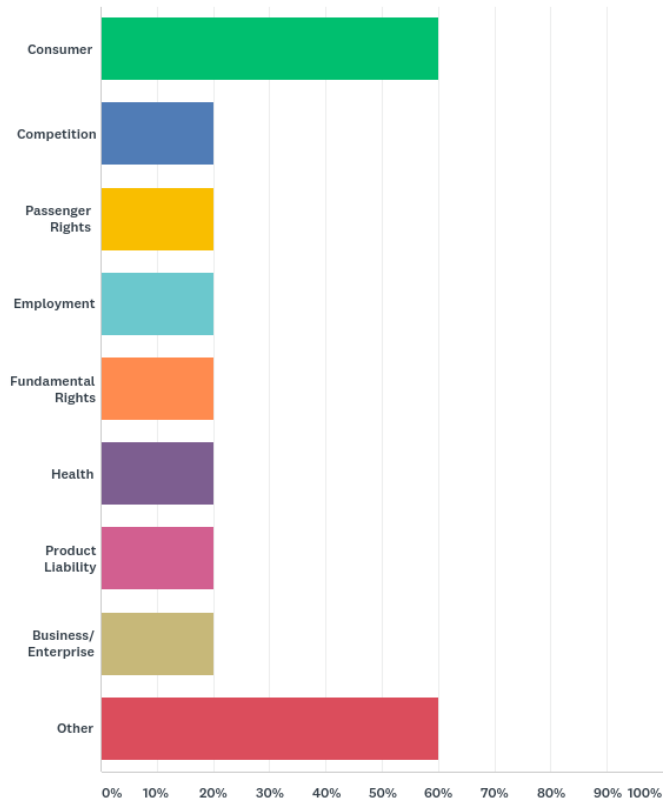
- Lack of regulation of funding and fee agreements.
- The lack of access to funding
- Strict rules on standing.

## **II. Data**

Data were collected from a group consisting mostly of practitioners and academics with one claimant focussed organisation. Sixty per cent of the respondents had a specialism in consumer law alongside a range of other disciplines. The responses to the survey were therefore more based on the mechanisms available under the ICC, the *azione di classe* and the *azione inibitoria* than the traditional methods of joinder.

### Q3 Please select your field of expertise

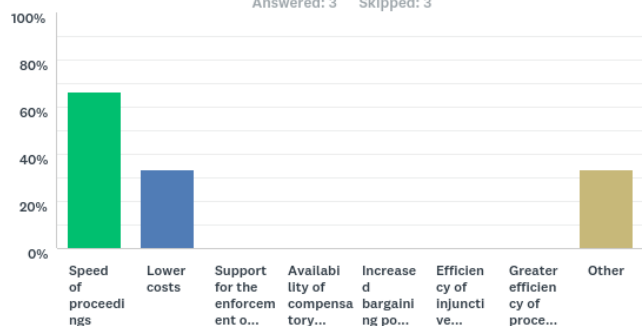
Answered: 5 Skipped: 1



Of those surveyed only 33% had been involved in a collective redress procedure. For those that had, the main incentive for participation was the speed and reduced costs associated with collective proceedings. Half of the respondents who addressed the question considered that the average time to dispose of a collective claim would be less than if the same cases were conducted under the traditional mechanisms of joinder.

### Q17 Which factor(s) influenced your decision to use collective procedures to gain compensation?

Answered: 3 Skipped: 3

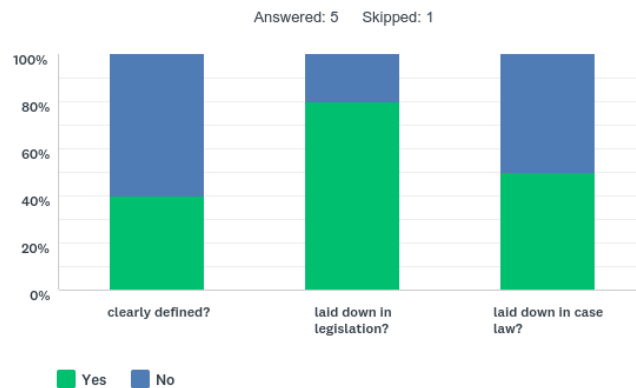


Collective redress in Italy does not appear to have a significant cross border element. None of those surveyed had had any experience with cross border collective redress and, to the best of their knowledge, no cases involving a foreign claimant or defendant have been brought in Italy. Nevertheless, there

was an impression that there were certain difficulties attached with cross border actions with 50% of respondents citing it as 'very difficult' in compensatory cases.

The majority of participants considered that the conditions for bringing collective redress were not clearly defined and that case law had not assisted matters (Q19, below). Specifically, one participant pointed to the lack of clarity regarding the requirement that the individual claims must be homogenous, stating that this could cause difficulty during the certification stage of the *azione di classe*. Under the *azione inhibitoria* however, the requirement that claimants are listed on the official register means that standing is somewhat more straightforward in injunctive actions.

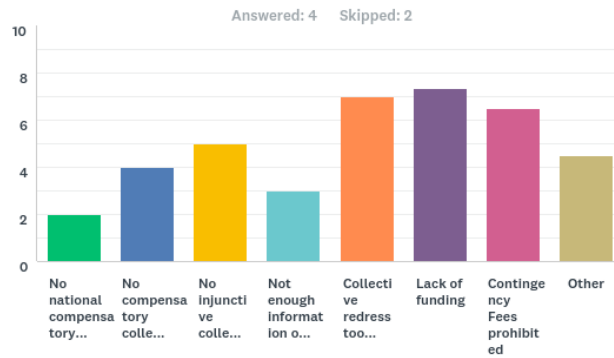
Q19 Are conditions for standing to bring representative actions



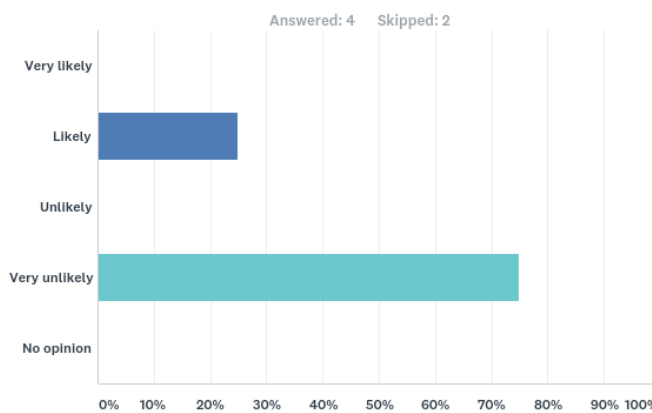
**Those that had not brought collective proceedings consistently identified funding and costs as key reasons for not doing so** (Q11, below). The availability and rules on funding were issues frequently raised in responses. Seventy five per cent stated that they were unlikely to bring proceedings in Italy in light of the current position on 3<sup>rd</sup> party funding (Q43, below). Furthermore, 80% of those surveyed said they found that court fees were a deterrent to bringing proceedings.

The loser pays principle applies in collective proceedings, therefore the general rule is that the unsuccessful party will pay the costs of the successful party. This is subject to the discretion of the court. The majority of participants considered that this approach was a deterrent to bringing a collective claim.

**Q11 With 1 being the predominant reason, please rank the reasons selected in question 5**



**Q43 How likely are you to bring collective actions in light of your jurisdiction's rules on third party funding?**



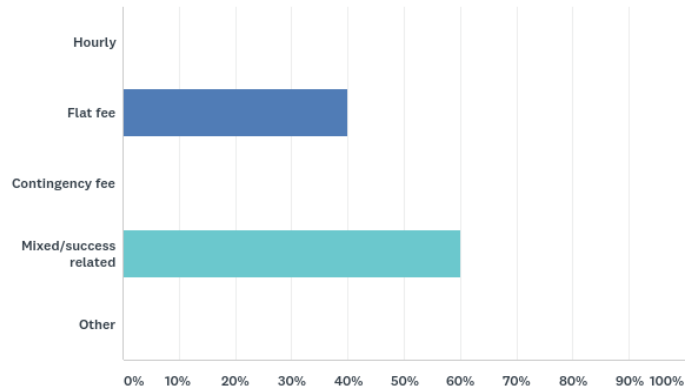
**None of the respondents had experience with settlement and they estimated that settlement occurred in only a small number of cases (approximately 0-29% of cases).** They considered that settlement was not an effective method of protecting consumer rights.

**Lawyers' fees are typically either paid on a flat fee or success fee basis.** Contingency fees, however, remain prohibited and **60% of respondents said that this affected their decision as to whether or not to bring proceedings.** It could be inferred that the number of collective actions would therefore increase if full contingency fees were permitted although there is no evidence from the study to suggest that there would be significant numbers of lawyers willing to offer this type of arrangement.



### Q36 How are lawyers' fees paid in collective actions?

Answered: 5 Skipped: 1

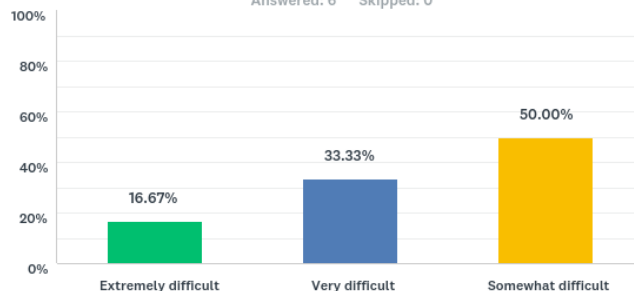


Some of **the claimant focussed participants in the study did not favour using the *azione di classe***, instead preferring to join related claims under the traditional civil procedure rules. Various reasons were cited for this, one respondent stated that the collective redress procedure does not fully protect the interests of victims and places all power and control over the conduct of proceedings in the hands of consumer organisations. Other respondents who practiced in areas concerning mass damage which were not covered by the *azione di classe*, such as personal injury, considered that collective procedures would be appropriate in these areas although gave no indication that they would utilise them. Moreover, the lack of a collective redress mechanism in a particular area was not ranked as one of the most important reasons for not seeking collective redress (Q11, above)

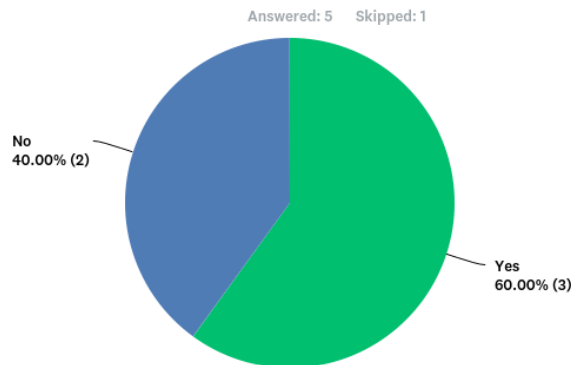
The majority of respondents considered that collective actions did enhance access to justice (Q51, below). However, this was not without some reservations and it was much clearer that collective actions are not widely considered to be an effective method to obtain compensation for victims (Q54, below). Aside from funding, participants identified taking of evidence and the courts' own efficiencies as difficulties in compensatory collective redress proceedings. All those surveyed felt that some level of difficulty was associated with obtaining compensation through collective redress (Q12, below).

### Q12 How difficult have you found gaining compensatory redress in mass claims?

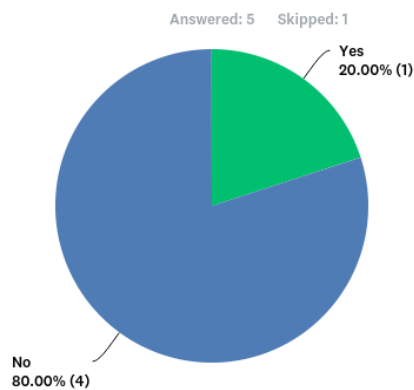
Answered: 6 Skipped: 0



**Q51 In your opinion, is access to justice enhanced by collective redress?**

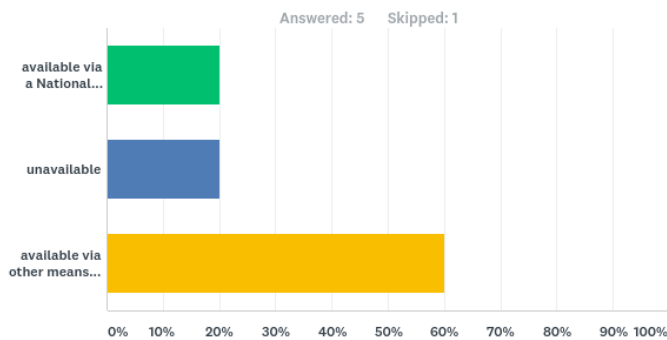


**Q54 Are collective actions an effective method to obtain compensation?**



**Information about collective redress is not provided through public channels** but rather is disseminated by consumer organisations or is obtained by individuals through their own research. Twenty per cent of respondents considered that information was unavailable. Furthermore, only half of the participants thought that there was sufficient information available on the collective redress mechanisms themselves, one participant specifically stated that there are still significant numbers of consumers and undertakings who are not aware that collective actions are available as a method of seeking redress. Seventy five per cent of the respondents stated that consumers are insufficiently informed about collective redress, only one claimant focussed lawyer considered that consumers were sufficiently informed and aware of the available collective redress procedures.

## Q56 Information about ongoing collective redress proceedings is



Although not widely utilised there are clear and well-defined procedures in Italy for group actions under which consumers are able to obtain redress. These were introduced in order to enhance access to justice for consumers and provide them with an easy route to achieve redress. However, these collective mechanisms appear to have been affected by the same procedural inefficiencies as regular proceedings.

Claimants face considerable barriers to bringing collective actions in Italy. Primarily there is a severe lack of available funding both from consumer associations themselves and third parties. Furthermore, there appears to be something of a cultural reluctance of Italian lawyers to engage in collective redress procedures with many opting to use other methods to obtain redress in order to protect the individual nature of their clients' claims. Furthermore, there is, anecdotally at least, a resistance on the part of the judiciary to the use of collective redress. Nevertheless, there are consumer organisations who are active in the area of collective redress and utilise the *azione di classe* and the *azione inibitoria*.

The areas in which the current collective redress regimes are inconsistent with the Recommendation do not appear to be the greatest source of difficulty in bringing collective actions. The study did not indicate that further legislation in these areas would increase the efficiency of the system, rather ensuring access to justice through collective actions requires increased information as well as focus on developing a reliable method of funding claims.

# LATVIA

## I. Overview

There is **no horizontal collective redress mechanism** in Latvian law.

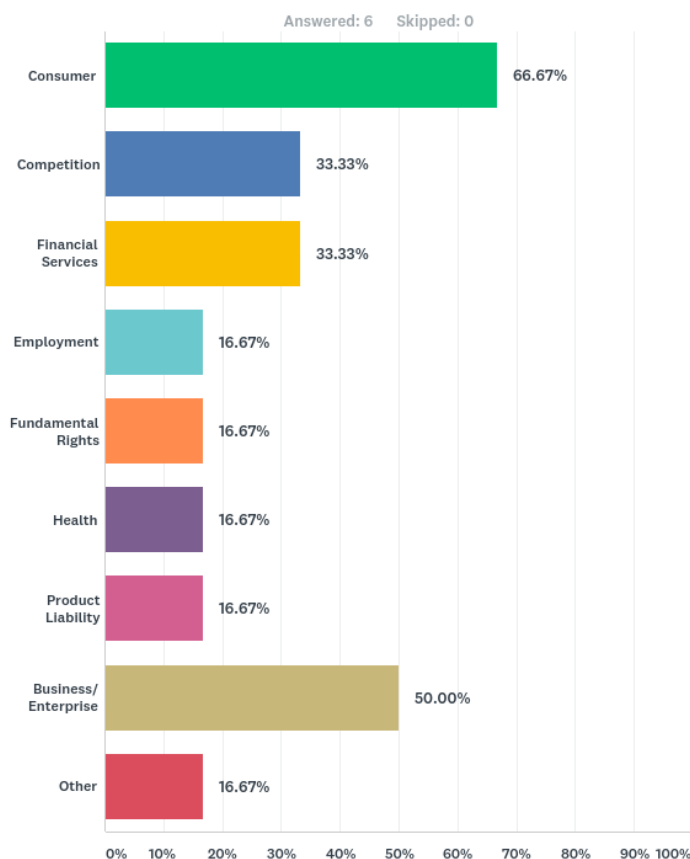
An **out-of-court collective ADR mechanism exists for consumers**, and is controlled by the state institution, the Consumer Rights Protection Centre. The Centre has competence to issue an injunction and set a penalty in cases where a violation of the consumer rights affects the collective interests of consumers. Compensation is available only if the trader signs a written commitment acknowledging the violation. However in practice, most traders do not sign the written commitment because they disagree with the decision of the Consumers Rights Protection Centre, and consumers are not compensated.

If the Consumer Rights Protection Centre has a reason to believe that a violation of consumer rights has been or may be committed and it may cause immediate and significant harm to the economic interests of the particular consumer group, it is entitled to take interim measures. The trader shall inform the Centre on implementation of the decision rendered by the Centre, and in case such information is not received by the Centre or the trader has not implemented the activities, administrative penalties apply.

The decision taken by the Consumer Rights Protection Centre is an administrative procedure. Decisions can be appealed to the Administrative Court. By decision the Centre is entitled to cease illegal behaviour and/or impose the penalty which is payable to the state budget. No decision on consumers' compensation can be taken.

## II. Data

**Empirical data** were gathered from lawyers, an organisation representing claimants, a judge, a competition authority, and the Consumer Rights Protection Centre. Their fields of expertise cover the following areas:



None of the stakeholders has practical experience of a collective redress mechanism as understood by the Commission Recommendation, as Latvian law does not provide for one. It is mentioned that in light of the existing mechanisms in Latvia, the Ministry of Justice does not consider it necessary to implement collective redress.

Stakeholders speculated on a hypothetical implementation of a collective redress mechanism, and one of them points out eventual difficulties regarding **costs**: "at the end of 2015, consumer organisations and other NGOs were deprived of an exemption that existed before with regards to court fees. The current situation makes it difficult for them to go to court, so if a collective redress mechanism was introduced, the costs of such procedure would be a problem". Another stakeholder raises the issue of **funding**, reporting that "the absence of (a collective redress) mechanism impairs access to justice, but it is unsure whether NGOs would be ready to support consumers in such procedures because they are not very well financed by the government and are therefore not very strong". Thus, because of the relatively "weak" position of NGOs, it is unclear whether they would be able to support consumers and bring a collective claim.

When discussing the impact of collective redress on **access to justice**, respondents are unsure. One of them answers that "in theory", access to justice is enhanced by collective redress, and another argues "it is difficult to say because many factors are at play. It depends on costs of litigation, on possibility to gain compensation, and lawyers may see collective redress as an opportunity to profit, so it could both ways".

However general remarks from the stakeholders highlight how **the absence of collective redress limits the access to justice**. In particular, court

costs deter consumers from bringing individual claims. The disproportion regarding the value of their claim is reason enough for them not to pursue a claim. One case is cited by a consumer organisation as an example: some credit companies in Latvia were heavily fined for violating the law, and a total consumer damage was estimated at five millions euros. It appears that no consumers brought an individual claim for compensation.

# LITHUANIA

## I. Overview

There are two general collective redress mechanisms in the Lithuanian legal system. Both are contained in the Lithuanian Civil Procedure Code (CPC). One mechanism is the Protection of Public Interest proceeding (Article 49 CPC) and the second mechanism is a Group Action proceeding (Chapter 24/1 CPC). In practice, the Protection of the Public Interest mechanism is used to gain injunctive relief whereas the group action proceeding is used for both injunctive and compensatory relief. Both mechanisms are opt-in procedures.

One of the key differences between both mechanisms is standing. Legal standing for a claim to protect the public interest is restricted to a prosecutor, state, municipal authority or other persons identified in law. Therefore, precise conditions for standing under this mechanism are contained in specific laws, particularly sector specific laws. Under the group action procedure, there are no specific provisions on locus standi.

In Lithuania, a joinder of claims is possible (Articles 43, 44 and the specific rules in Articles 56, 113, 120, 186 CPC). Both injunctive and compensatory relief available via the joinder mechanisms. The CPC establishes two forms of joinder of claims: compulsory joinder and optional joinder. Compulsory joinder is used when claim is brought by several co-plaintiffs together or against several defendants if the subject of a claim is rights or liabilities assumed by them together in accordance with laws. Optional joinder is used when a claim is brought by several co-plaintiffs together or against several defendants if the subject of a claim is concerns rights or liabilities of the same nature, based on the same matter on actual and legal issues, when each separate demand could be a subject of an independent claim.

There is no out of court collective redress (collective ADR) mechanism in Lithuania.

As to remedies, the CPC prohibits punitive and/or extra-compensatory damages. The skimming-off/ restitution of profits scheme is not available in Lithuania.

As to costs, Lithuania follows the 'loser pays' principle. The CPC establishes special rules for the split of litigation costs between the group members. The dominating principle is equality; litigation expenses incurred by the party in whose favour the judgment was made shall be awarded by the court to the group action plaintiffs in equal parts.

As to funding, the Lithuanian Law on the Bar<sup>17</sup> allows the use of success fees agreements. The CPC does not regulate either financing of the litigation, or contingency or success fees. Accordingly, there is no regulation of third party funding.

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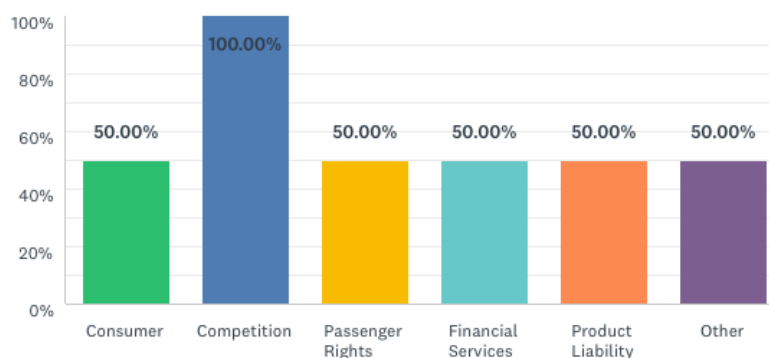
<sup>17</sup> Lithuanian Law on the Bar. Law No IX-2066 of 18 March 2004.

## II. Data

The following empirical data were gathered from two lawyers, one with experience of representing claimants and one with experience of representing both claimants and defendants. Their fields of expertise cover the following areas:

Please select your field of expertise

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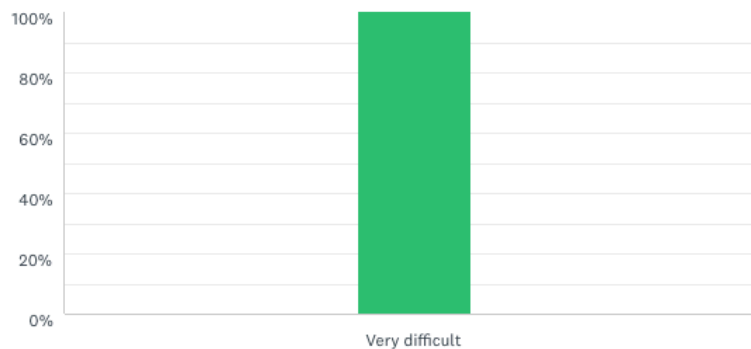
The respondents do not have experience of bringing collective actions for injunctive relief and so their opinions are based on their experience of bringing claims for compensatory collective redress, particularly via the group action mechanism. The empirical data demonstrate that all of the respondents utilised **collective procedures to gain compensation** as the procedure can theoretically improve efficiency of proceedings, speed and lowered costs of litigation. Similarly, the respondents are of the view that **collective actions are an effective method to obtain compensation** as, as one respondent puts it, there is "much more potential to obtain substantial compensation through the pooling of people together."

However, the respondents' practical experience demonstrates that these benefits remain largely theoretical. The empirical data demonstrate that the respondents found some difficulty in gaining compensatory relief. The stakeholders were of the view that gaining **compensatory redress in mass claims** was 'very difficult'. One interviewee has commented that in light of the difficulties, he uses the joinder mechanism rather than the specific group action mechanism to resolve disputes.



## How difficult have you found gaining compensatory redress in mass claims?

Answered: 2 Skipped: 0



Stakeholders identify substantive and practical reasons for their choice. Substantive concerns are based upon the procedural and threshold difficulties experienced by respondents at different points of the group action proceeding. Substantive concerns for one respondent include the high burden for establishing liability and the restrictive interpretation of the commonality requirement. All respondents share a concern that the strict adherence to the formality requirements by the courts as well as the restrictive interpretation of who can be group representative is a difficulty.

Practical issues highlighted by respondents include the establishment of proof of damage at an early stage of proceedings. One respondent commented that for some types of claims, e.g. consumer law cases, there is a difficulty in stipulating with certainty the amount of damages without expert help. Finding experts on damages at this stage of proceedings is a burden. Other practical hurdles include administrative processes such as the requirement for each claimant to submit forms of acceptance. Other practical hurdles include issues in communicating with claimants, management of the group, difficulty in acquiring evidence from the defendant and the length of trial procedure. Additionally, the high costs involved in bringing claims appears to be an issue for stakeholders as all respondents deem collective proceedings as generally too costly and a disincentive to using a collective mechanism to resolve disputes.

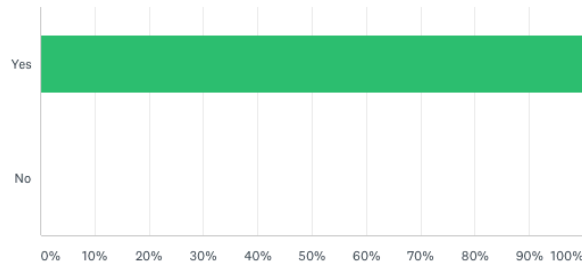
However, despite issues with costs, 50% of the respondents perceive collective proceedings as advantageous in **follow on collective actions** for compensatory relief. In particular, the benefits of speed and greater efficiency of the procedure was identified as a reason for this opinion. In particular, the respondent representing claimants, highlighted the availability of a final public body decision (such as competition council) on liability an advantage.

As for **locus standi of the group representative**, the empirical data show that conditions for approval can be onerous on claimants. One respondent cited the requirement that letters of acceptance from all claimants required before group representative is accepted by court as evidence for this perspective. Additionally, one other respondent commented that "there is also a requirement that the entity needs to be active in the sector concerning the claim and have the interests covered by the claim as part of the scope of the entity's purpose i.e. included in the entirety's articles of association."

The empirical evidence demonstrates that stakeholders consider that there are practical advantages of having collective redress mechanisms. In particular, all the respondents are of the opinion that Lithuanian collective redress mechanisms improve **access to justice** and ensure **fairness of proceedings**.

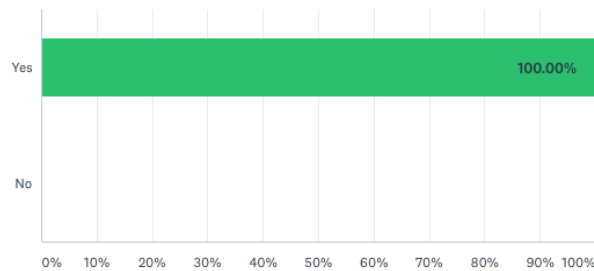
Do collective actions ensure fairness of proceedings?

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In your opinion, is access to justice enhanced by collective redress?

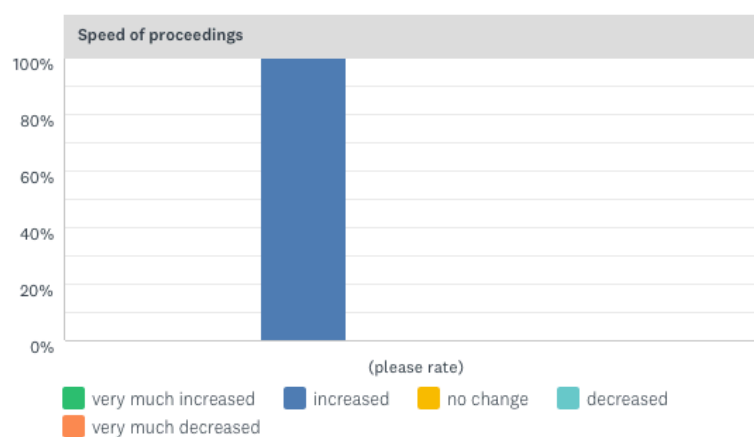
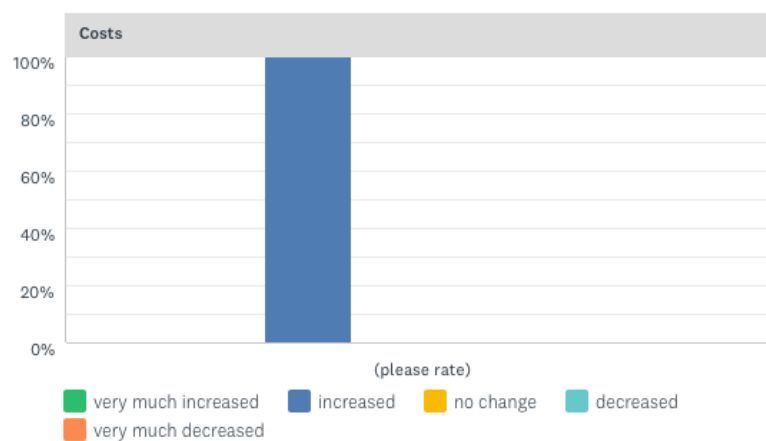
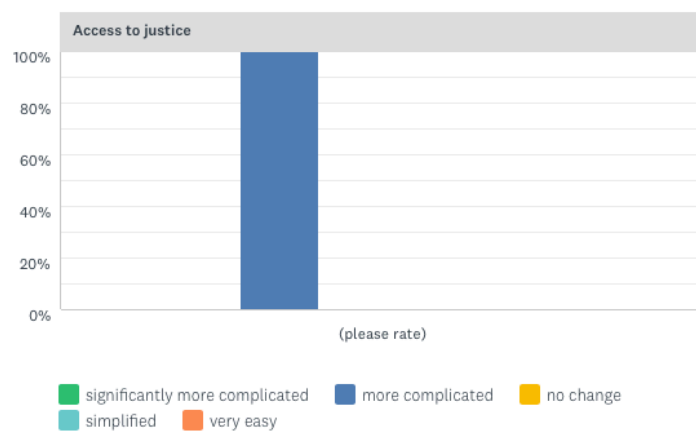
Answered: 2 Skipped: 0



All respondents acknowledge the potential beneficial effect of collective redress on claimants with limited damage. Stakeholders are of the view that bringing a "small" individual claim might not be worth the time and effort for most claimants, and a collective redress mechanism is useful to mitigate the consequence of this. As it concerns **fairness of proceedings**, one respondent is of the view that the opt-in nature of the group action and the rules of evidence balances the interests of all parties. However, the empirical data demonstrate that **access to justice** and **fairness of proceedings** is not fully realised.

If an opt-in regime is available, has it caused any particular problems in relation to

Answered: 2 Skipped: 0



The substantive and procedural obstacles identified in the respondents' comments on compensatory collective redress were raised as reasons for their choices to this question. One respondent was also of the view that "courts are approaching the class action mechanisms in the same manner as they would individual claims. Furthermore, the strict evidentiary requirements

disadvantage older claimants who would not necessarily have kept the evidence needed to join a claim.”

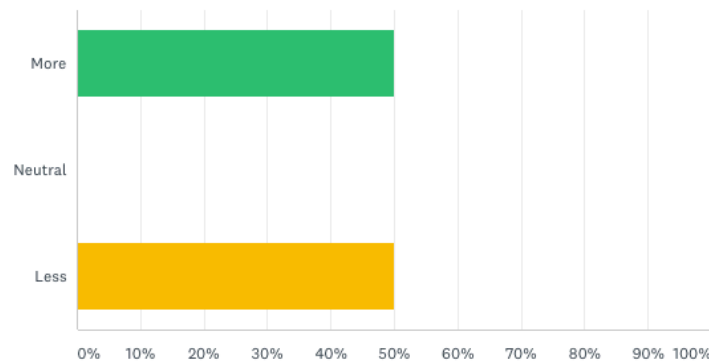
As for the **costs of proceedings**, all respondents were of the view that contingency fees do not affect their decisions to bring collective claims. Similarly, **court fees** are not a deterrent. One respondent was of the view that the current approach to **third party funding** makes bringing a collective proceeding more likely.

The empirical data show a 50:50 split between stakeholders on their view as to the **burden compensatory collective redress places on the courts**.

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Compared to non-representative, non-collective action, what burden does collective compensatory redress have on the court?

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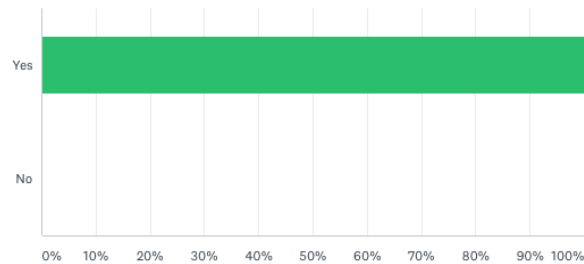
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Whilst both stakeholders point out that the burden should be theoretically less as multiple claims are disposed of in the proceedings. Each stakeholder proffers a different reason as to why this advantage is curtailed and the stakeholder representing both defendants and claimants is of the view that this tips the scale in favour of a 'more' burden. This stakeholder argues that in practice, if one party in a group wins' large damages then there is the likelihood of a switch to individual proceedings by the other group members. Furthermore, the stakeholder points out that as more time is required to be spent in preparation for proceedings and addressing the formalities questions, the burden can be in practice greater.

There seems to be a direct correlation with the respondent's answers to the above questions and to their response that there are **aspects which can be improved in the group action mechanism**.

Are there any aspects of the collective compensatory action procedure in your jurisdiction which could be improved?

Answered: 2 Skipped: 0



One respondent is of the view that there should be a presumption of damages at the outset of proceedings, rather than having a claimant prove quantum. All respondents are of the view that the restrictive approach taken by the courts to issues such as admissibility and certification should be relaxed and that the courts should treat not collective claims with the same formality that they treat individual claims.

The empirical data show that all respondents are of the view that it is possible to seek an **injunction and compensation within a single action**. However, the injunction in this case is of a preliminary type but can be used in a subsequent individual action for damages. It is practice however, that the injunction and compensation proceedings are split. One respondent was of the view that this increases efficiency of the individual proceedings as the injunctive order helps to establish liability.

As for the **availability of information on collective proceedings**, one of the respondents was of the view that whilst there is sufficient information that a collective redress mechanism exists, the level of information can be better as it is not always possible to find information due to limited public awareness.

# LUXEMBOURG

## I. Overview

Luxembourg law does not provide for a specific horizontal class action mechanism. Traditional rules of joinder exist, and a sectoral injunctive mechanism is available in consumer and competition law.

A **general joinder mechanism** is available. Claims may be joined and it is possible to ask the court to rule on them together, under Article 206 of the New Code of Civil Procedure (*Nouveau Code de Procédure Civile*) ('NCPC'). The joining of the cases is procedural, and each claimant individually needs to have both sufficient standing (*qualité d'agir*) and a legitimate and direct interest (*intérêt d'agir*).

**Collective claims are provided for in case of unfair commercial practices** by Article 23 of the Law of 30 July 2002. An individual, professional group or accredited consumer association can bring the claim for the cessation of any infringement of the Law. Currently, the only entity which has been allowed to file a group action is the ULC (*'Union Luxembourgeoise des Consommateurs'*), which is financially assisted by the State. Third-party funding is unknown in Luxembourg, however no legal or regulatory provisions prohibits a third party from funding a claim.

The consumer group action is a summary proceeding to obtain an injunction. The cessation of the infringement may be ordered even in the absence of evidence of actual loss or damage, or negligence on the part of the defendant. The Court can order any protective or interim measures to prevent a damage or put an end to a violation, and any failure to comply with the injunctions or prohibitions imposed by a final decision may be punishable by a fine. The court can encourage the parties to settle, and the parties can chose to do so at any time. However, there is no specific collective ADR mechanisms.

An injunction/sanction from the Luxembourg Competition Authority constitutes an irrefutable evidence of fault for the purpose of an individual action for compensation. However, the follow-on compensatory action cannot be collective.

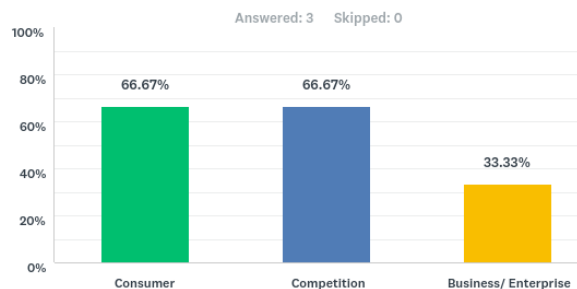
As to costs, the losing party usually does not bear the legal costs: each party bears its own. However, the successful party may recover a procedural indemnity from the losing party, the amount being determined by the judge. Luxembourg law does not allow damages to be punitive or exemplary.

A specific type of representative action may be brought by a duly authorized entity to request the judicial review of an administrative decision issued by a public body. Such an action can only be brought if it is restricted to the protection of the collective interests of the organisation and does not extend to cover those of its individual members.

The current group action mechanism in Luxembourg can only aim at putting an end to the infringement. In the absence of an effective collective redress mechanism, the right to compensation and the right to access to justice remain theoretical for Luxembourg consumers.

## II. Data

The **empirical data** were gathered from stakeholders with expertise in the following areas:



Collective redress has had very limited development in Luxembourg, with only one sectoral injunctive mechanism available, and one consumer association bringing the claims in practice. Thus only one of the respondents draws answers out of personal experience. The others stakeholders base their answers on general knowledge of collective redress, comparison to neighbouring countries, and comparison to existing mechanisms in Luxembourg.

Have you been involved in collective redress (as claimant, claimant lawyer, other) or are you envisaging such involvement?



The consumer association bringing collective claims in Luxembourg (and the only one to do so) files around five claims a year. **Gaining an injunctive order** is said to be relatively easy and fast, as the action follows a summary procedure. For the association, the main advantage is to give a clear signal to the market. When an entity infringes on the rights of consumers, bringing an action creates visibility, and the jurisprudence will serve as a warning for other business entities. Another respondent's answer supports this opinion: the availability of collective redress impacts the behaviour of business entities, inciting them to be conscious of their behaviour on the market.

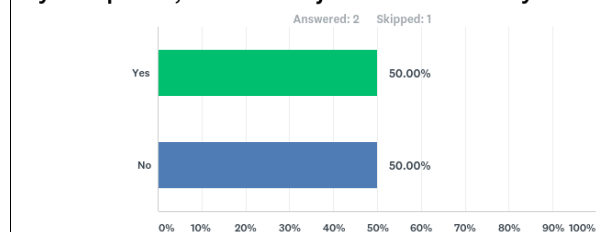
In practice, the vast majority of the cases leads to **out-of-court settlements**, and the consumer association favours the flexibility of negotiating with the infringing entity, to avoid court proceedings. Regarding the protection of the rights and interests of all the parties to the settlement, the consumer association mentions that, although it tries to make sure fairness and equity are at the core of the negotiations, it might happen that there is no "follow up" on the actions of the infringing entity, regarding the commitments settled upon.

In Luxembourg, although the law gives a fairly large scope for **standing**, only one consumer association has been bringing claims so far, and one respondent believes it is an issue of means and resources. The consumer

association also raises concern as to the potential difficulty of facing **court costs**, were a compensatory collective redress mechanism to be implemented. They believe costs might act as a deterrent factor in bringing claims.

Compensatory collective redress is not implemented in Luxembourg. However, in competition matters, it is possible to **rely on an injunction order in a subsequent individual compensation claim**. A decision from the Luxembourg Competition Authority (sanctioning a business entity for instance) amounts to irrefutable evidence of a fault for the purpose of an individual action for damages. One respondent mentions that it does facilitate the process for consumers seeking individual compensation. However when the damage is limited, consumers do not bring a claim in practice.

In your opinion, is access to justice enhanced by collective redress?



Opinions on **access to justice** appear divided. On one hand, one respondent cite the potential positive effect of compensatory collective redress for consumers with limited individual damage. They would not bring a claim on their own, so in that sense, collective redress does enhance access to justice. Another respondent is however doubtful as to the practical efficiency of the mechanism, regarding the ongoing case law in neighbouring countries (France and Belgium). The length and complexity of the proceedings, especially during the admissibility phase, make the respondent believe compensatory collective redress is a slow and costly procedure.

General remarks from the respondents indicate that Luxembourg does lack a collective compensatory mechanism. However the main player in the field (the consumer association) believes the existing mechanisms are sufficiently efficient to protection the general consumers' interest.

Additional comments from the Union of Luxembourg Enterprises (UEL), a body that groups employers' confederations, federations, associations and professional chambers in Luxembourg, follow a similar reasoning. They are not in favour of the implementation of a collective redress mechanism, and cite length of proceedings, excessive legal costs, additional burden on the courts, and risks of abusive of litigation, as the factors guiding their opinion. They believe the priority should be given to existing mechanisms, and mention in particular the Regulation (EC) No 861/2007 of 11 July 2007 establishing a European Small Claims Procedure. For them, the practical use and efficiency of the procedure should be studied more thoroughly, as it represents a major step forward in the protection of consumers' interests, considerably facilitates access to justice, and reduces the costs of litigation of smaller claims. It may therefore have a positive effect on the behaviour of consumers who had so far been reluctant to take legal action. The Union adds that priority should also be given to Alternative Dispute Resolution mechanisms, and in particular mediation, which is an appropriate solution when the dispute revolves around a small value.



# MALTA

## I. Overview

There are two types of **horizontal collective redress mechanisms** in the Maltese legal system: (1) a Collective Action which is a rudimentary form of procedure whereby two or more plaintiffs bring one application and, (2) a Collective Proceedings action, which is limited to actions asking for the cessation of an infringement, or the rectification of the consequences of an infringement and, or compensation for harm. Both mechanisms allow compensatory and injunctive relief.

The Collective Action is contained in Article 161(3) of the Maltese Code of Organisation and Civil Procedure and allows two or more plaintiffs to bring their actions in one application if the subject matter of the actions is connected or the decision of one of the actions might affect the decision of the other action or actions and the evidence in support of one action is, generally, the same to be produced in the other action or actions.

In Collective Proceedings, an action may either be brought on behalf of a class of members by a registered consumer association/ad-hoc constituted body or by a class representative. The Act adopts an opt-in system. A framework for court-approved settlements exist. A compromise approved by the court binds every class member, except those who have been omitted after applying to the court or notifying the class representative directly. At present, the mechanism is available for breaches of competition law and consumer law.

In Malta, the **loser pays principle applies**. There are exceptions to this principle. Registered consumer associations are exempted from the payment of the fees due to the court registry and the judicial costs may be shared amongst the parties to the lawsuit where a novel point of law was dealt with. There are no provisions in the Act on **third party litigation funding** in the case of collective proceedings. Maltese courts may add up a "penalty" of €2,500 where it finds that the collective proceedings were frivolous or vexatious.

At the time of writing, it does not appear that the Collective Proceedings mechanism has been used in more than 2 reported cases. One case is still pending and the other settled.

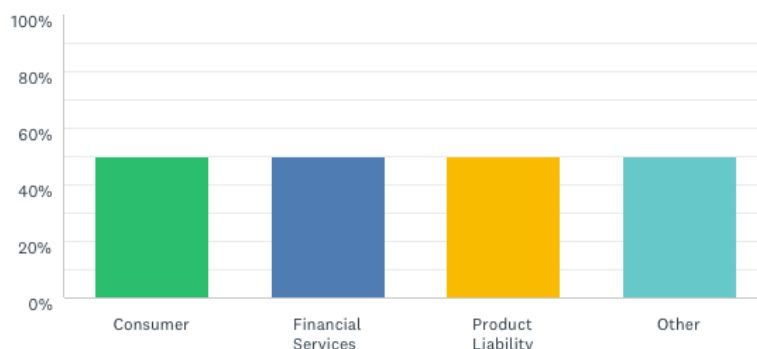
## II. Data

The following empirical data were gathered from an organisation representing claimants or potentially representing claimants (e.g. NGO) and one lawyer representing a defendant or a potential defendant.

Their fields of expertise cover the following areas:

## Please select your field of expertise

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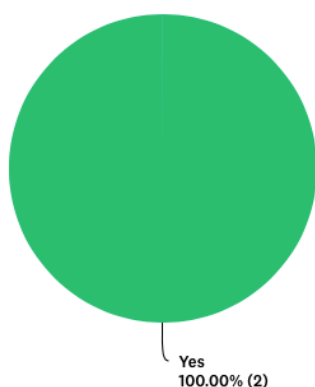
The empirical data suggest that the limited utilisation of Collective Proceedings mechanism (2 cases since 2012) has had a restrictive impact upon the scope of experiences of stakeholders. The motivation for 50% of stakeholders to use collective procedures to resolve their dispute was based upon two factors: the increase of bargaining position and the possibility to resolve multiple small disputes through one judicial process.

The empirical evidence demonstrates that stakeholders see practical advantages of collective redress mechanisms. There have been no instances of **abusive litigation** and 100% of respondents see no **risk of abusive litigation**.

One practical advantage cited by the respondents is **access to justice**.

In your opinion, is access to justice enhanced by collective redress?

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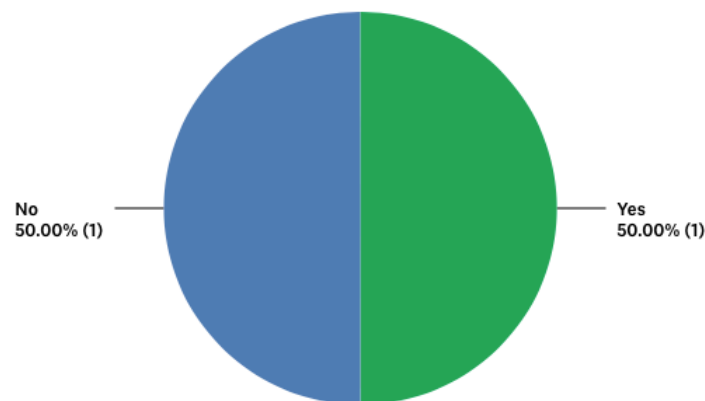


In the respondents' view, consumers with small claims are provided with an avenue to resolve disputes with little cost risk. However, for the other respondent, their practical experience indicates that access to justice is not free from obstacles. Interviewee comments from the claimant stakeholder indicate that "English speaking claimants are disadvantaged in their use of collective proceedings in the Maltese legal system as it does not easily

accommodate claims being conducted in English.” In the claimant respondent’s case, procedural hearings were conducted in Maltese despite all claimants being non-Maltese and their wish for proceedings to be conducted in English suitably and reasonable conveyed to the court. These factors also lead to an increase in time and costs of proceedings. Nevertheless, in light of these experiences, the interviewee was of the view that the collective procedure allowed claimants to group together to share the financial and practical burden of these issues.

### Do collective actions ensure fairness of proceedings?

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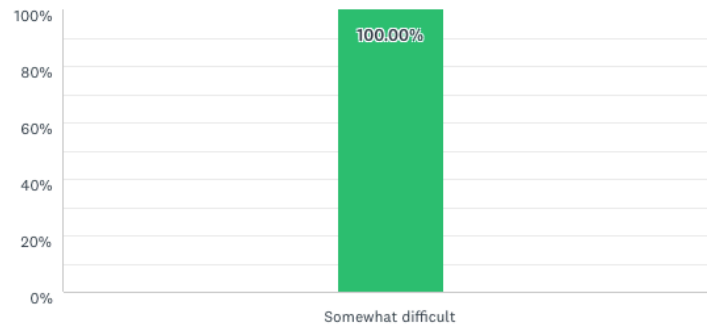


As for **fairness of proceedings**, the responses are mixed in nature and reflect a divergence based on type of stakeholder. For one respondent, their disadvantage arose from being the first dispute to be resolved via the collective proceedings mechanism. The respondent found an absence of guidelines as to how the collective proceedings mechanism should work which disadvantaged the frame and conduct of their claim. Conversely, 50% of the respondents were of the view that the procedure allows due process to be followed and all parties are offered the opportunity and time to present arguments in their favour.

A correlation exists between 50% of respondents’ answers to access to justice and fairness of proceedings to their difficulty in **gaining compensatory redress in mass claims**.

How difficult have you found gaining compensatory redress in mass claims?

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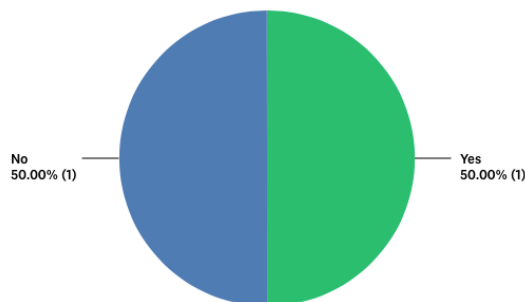


The respondent who answered this question highlighted the increase in the time taken to adjudicate their claim. In the interviewee's case, her claim started in 2013 and was resolved via settlement in 2015. Furthermore, for this respondent, there was no practical difference between the collective proceedings mechanism and the individual claims process. Judges expected the same burden requirement and treated the collective proceedings with the same formality as individual claims.

The empirical data demonstrate that the responses to the **effectiveness of collective procedures to obtain compensation** are mixed in nature and reflect a divergence based on type of stakeholder.

Are collective actions an effective method to obtain compensation?

Answered: 2 Skipped: 0

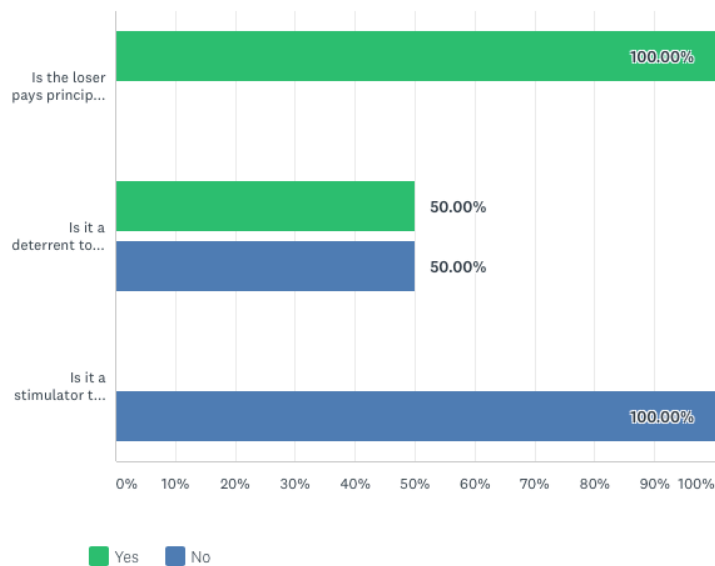


In light of the claimant's response to access to justice and difficulty in gaining compensatory redress, her view is that collective proceedings are not an effective mechanism. The defendant respondent was of the view that the Collective Proceedings mechanism retains its theoretical benefits of serving multiple claimants and reducing cost.

A similar mixed picture exists as to the effect of the **'loser pays principle.'**

Loser pays principle: the party that loses a collective redress action reimburses necessary legal costs borne by the winning party, subject to the conditions provided for in the relevant national law

Answered: 2 Skipped: 0



Out of the respondents who answered the question, 50% were of the view that whilst there is a theoretical deterrent effect, the ability of the courts to reduce costs if the loser is a consumer association undermines the strength of this deterrence. The remaining respondent mentioned that irrespective of the application of the principle, a claim was still pursued as this was the only avenue left for the claimants.

The empirical data show that **court fees** are not a deterrent to the bringing of a collective claim. 50% of respondents were of the view that **contingency fees** do not affect their decision to bring a claim

With regard to **settlements**, the data demonstrate that 50% of stakeholders have experience of resolving their claims via settlement with 0-29% of the stakeholder's claims being resolved in this manner. The claimant stakeholder had 1 settlement after legal proceedings were commenced. This settlement was acquired via a combination of non-legal factors such as lobbying of state authorities, publicity and preparation of further litigation against the defendant. The claimant stakeholder was of the view that the **rights and interests of both parties were protected** in the settlement as the claimants got what was claimed and there was no reputational loss for the defendant.

As to the **opt-in mechanism**, the claimant respondent was of the view that this feature made access to justice more complicated, caused an increase in costs and a decrease in speed of proceedings. The respondent cited the obstacles she faced regarding the conduct of proceedings in Maltese as a basis for her answer. The data do not provide any further explanation.

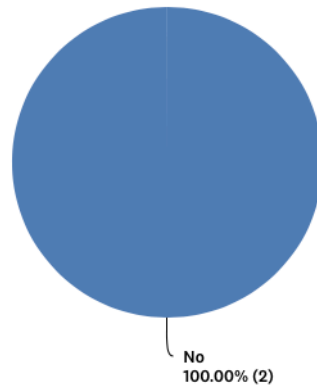
The empirical data show that it is possible to seek an **injunction and compensation in a single action**. It is not clear from the data as to the

advantage or disadvantage of this possibility. This injunction is of an interim nature and does not resolve the merits of the action.

Despite a divergence of experiences, 100% of respondents agree on the scope of **information available regarding collective redress**.

Is sufficient information available that a collective redress mechanism exists in your country?

Answered: 2 Skipped: 0



One respondent comments that there has been no public initiative to raise awareness of the collective proceedings mechanism or existing cases apart from some sporadic headlines in the media. The other respondent found out about the possibility of using this procedure only after the initial consultation with their lawyer.

A general remark from one respondent point to the concern of the restrictive approach taken to the applicability of the Collective Proceedings mechanism. In particular, the respondent felt that there was a missed opportunity to extend the collective proceedings mechanism to financial services.

# THE NETHERLANDS

## I. Overview

There are **general collective redress mechanisms** in the Dutch legal system. There are two mechanisms which are specifically drafted with the goal of collective redress in mind: The Collective Settlements of Mass Claims Acts procedure (WCAM) and the collective action procedure which is based on Articles 3:305a-305d of the Dutch Civil Code.

In addition to these two mechanisms, an action on the basis of mandate/power of attorney and/or transfer/assignment of claims to a special purpose vehicle (SPV) exists. This mechanism is not specifically tailored to mass claims but is used in practice for collective redress. Either of the three mechanisms may be combined by a claimant.

The remedies in the WCAM procedure are the remedies that may be part of a settlement agreement. These are primarily monetary damages<sup>18</sup>, but may include other obligations that require specific performance, as these are compensation of damage in kind.<sup>19</sup> Only injunctive or declaratory relief is possible through the collective action mechanism. The procedure for actions on the basis of mandate and/or transfer of claims allows a variety of remedies but is commonly used for compensatory relief.

As for **standing**, only non-profit entities, either ad hoc or pre-existing, that meet certain criteria can act in collective actions or conclude collective settlements under the WCAM. The entities under the SPV mechanism do not need to be of non-profit character.

As to **costs**, The Netherlands follows the '**loser pays**' principle, but the adverse costs are 'fixed' according a statutory scheme. The adverse costs awarded according to that scheme are relatively low in comparison to the real costs of litigation. In a WCAM procedure, the court may declare that the costs are to be paid by one or more of the petitioners,<sup>20</sup> but typically each party bears its own costs. In the collective action procedure, the organization is liable for any potential adverse cost orders.

**Third party funding** is allowed in The Netherlands and is currently unregulated. In collective actions, funding is often obtained via contributions from individuals whose interests are at stake or who have an idealistic purpose in supporting the organisation. Actions on the basis of mandate and or/transfer of claims are typically financed via individual contracts by the claimants with the SPV. The contract often stipulates that claimants will receive the award minus a percentage. Legal expense insurers pay increasingly a key role in (consumer) collective redress in the Netherlands.

A new legislative proposal on collective actions, including damages actions, is underway as of November 16, 2016. The proposal covers all substantive areas of law. It proposes compensatory relief via the Collective Action procedure.

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<sup>18</sup> see art. 7:907(1) Dutch Civil Code

<sup>19</sup> '*schadevergoeding in natura*', art. 6:103 Dutch Civil Code

<sup>20</sup> art. 1016 lid 2 Dutch Code of Civil Procedure

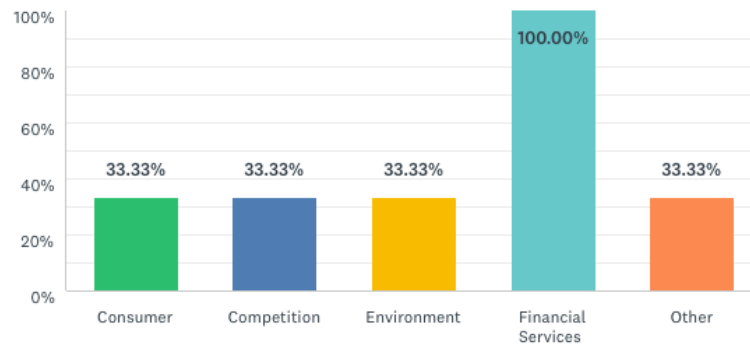
## II. Data

The following empirical data were gathered from one lawyer representing defendants, one lawyer representing both defendants and claimants, a defendant or potential defendant and a litigation funder. Three out of four respondents defended a collective action, were involved in collective redress (as defendant, defendant lawyer, other) or were about to defend a collective action.

The respondents' fields of expertise cover the following areas:

Please select your field of expertise

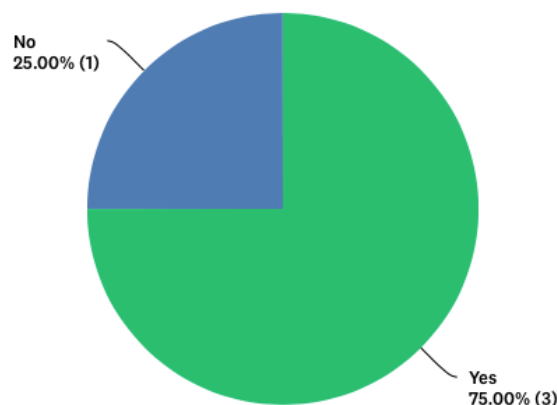
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The empirical data suggest that the majority of respondents view the Dutch collective redress mechanisms as generally **ensuring fairness in proceedings**.

Do collective actions ensure fairness of proceedings?

Answered: 4 Skipped: 0



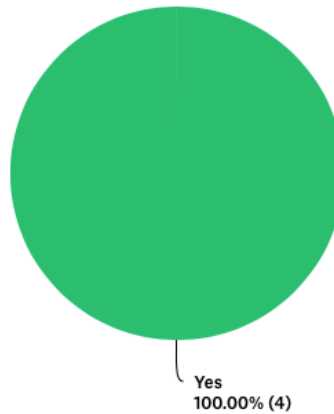
The litigation funder highlighted the pooling of claims as a basis for their answer. In their view, there is one piece of litigation or a few cases commanding more attention from the court(s), lawyers and expert witnesses involved.



The quantitative data also show a similar positive choice for **access to justice**. The empirical data suggest that all respondents view the Dutch collective redress mechanisms as generally enhancing access to justice.

In your opinion, is access to justice enhanced by collective redress?

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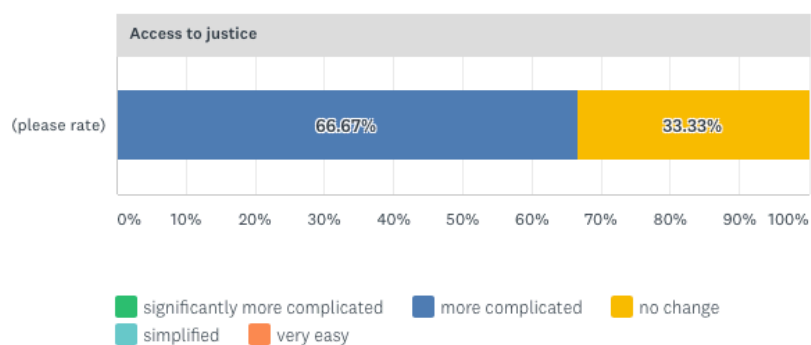


A defendant or potential defendant (e.g. SME or business entity) was of the view that in principle access to justice is ensured by the Dutch collective redress mechanisms as "costs are shared between more individuals/ groups." However, this respondent was of the view that this accessibility of justice is possible if there is a similarity in claims which often is not the case." Additionally, the litigation funder was of the view that litigation costs (including fact finding, data gathering, lawyers' and expert witnesses' fees, court costs) are shared by plaintiffs. Equally, governing law, merits, data collection etc. in a particular area's (antitrust and environmental) are often too burdensome for a single plaintiff and these are shared.

However, the empirical data demonstrate that full access to justice is yet to be achieved. Half of the total respondents take the view that the use of the **opt-out regime** complicates access to justice.

If an opt-out regime is available, has it caused any particular problems in relation to

Answered: 3 Skipped: 1



In response to this question, one respondent (litigation funder) commented that frequent opting-out causes settlements to be delayed and the pace of litigation to be increased. Additionally, the respondent representing defendants points to an increase in the frequency of re litigation because of the operation of the opt-out mechanism. However, the data demonstrate that the opt-out regime has had a positive impact on the **speed of proceedings**. Two-thirds of respondents who answered the question on speed of proceedings noted an increase because of the opt-out regime.

As for types of relief, the empirical data show that 50% of all respondents found some difficulty in **gaining compensatory redress in mass claims**.

How difficult have you found gaining compensatory redress in mass claims?

Answered: 2 Skipped: 2



The respondents who answered this question were of the opinion that the process to gain compensatory relief is cumbersome. One respondent commented that the common practice is for claimants to first bring a collective action procedure to establish liability and then use the collective action judgement as a basis to get a settlement via the WCAM procedure. However, the problem with this process is that it does not work if only a small percentage of the overall putative future individual claimants may be expected to go through with individual damages actions in case no WCAM settlement is reached. In an interviewee's opinion, "the wrongdoer has to feel the pressure of the entire class – otherwise it will sit still until the claims are time-barred and/or settle with the smaller active part of the class." The empirical data also demonstrate that the cumbersome process identified above is further supplemented by specific problems relating to EU cross border collective redress.

Whilst 75% of the total respondents highlighted problems relating to EU **cross border collective redress**, half of total respondents were of the view that EU cross border collective redress was of difficulty for both claimants and defendants. The problems or sources of difficulty of the respondents relate to questions of applicable law and jurisdiction. As regards jurisdiction, one respondent commented that "[T]he threshold for cross border collective redress is low. Dutch procedural law provides that, if the Dutch court has jurisdiction over one of the defendants (the anchor defendant), it has jurisdiction over other defendants (also if these are domiciled in another

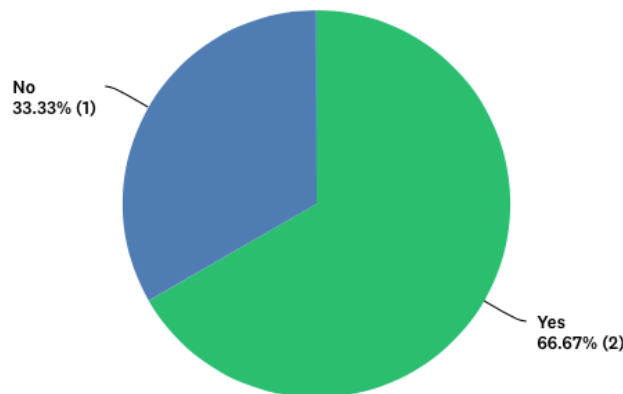
jurisdiction), if such connection exists between the claims against the anchor and other defendants then reasons of efficiency justify a joint hearing of these claims. As the Dutch court relatively easily assumes such connection, even in case of a weak claim against the anchor defendant, this could lead to a huge import in claims in collective redress matters.”

In addition, another respondent commented that the procedural time taken to dispose of proceedings involving foreign parties normally increases as defendants argue the applicability of foreign law before going onto the merits. This potentially adds on an extra 6 months - 1 year to the length of the proceedings.

There also seems to be a link between the stakeholders’ comments expressed on difficulty for gaining compensatory relief and the open comments received to the question on **risks of abusive litigation**.

### Are there risks of abusive litigation?

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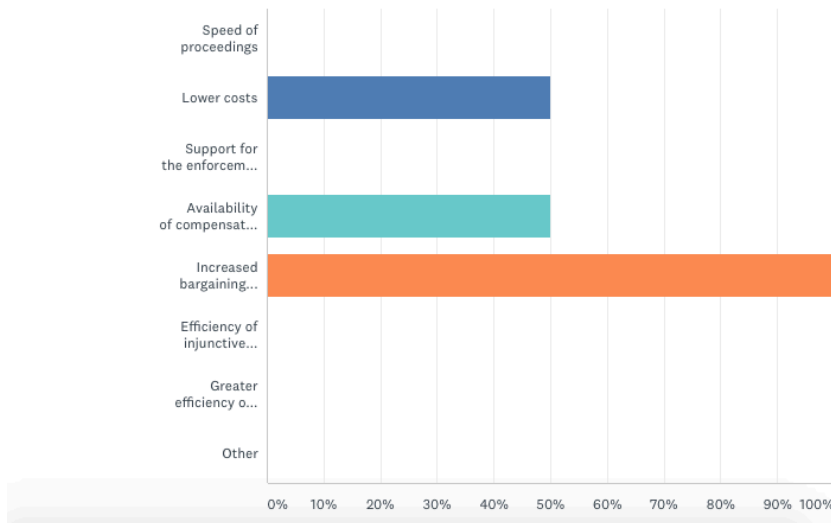


From the defendant respondent perspective, there is a concern that the Dutch court does not need to assess the relatively low threshold for damages for each member of the class when it renders a declaratory judgement on liability in a collective action. In particular, the defendant respondent took the view that risk of abuse arises out of the ability of the declaratory judgment to enable the individual claimants to subsequently start up quantum proceedings without the likelihood of any damage being established. This can be used to force a defendant to settle even when there is no legitimate claim as the possible scope of the potential class and the high reputational impact of collective redress actions deter engagement in further litigation.

Despite the expressions of difficulty, half of respondents (litigation funder and lawyer representing claimants and defendants) found collective redress a benefit to their negotiating strength/likelihood of success in gaining compensation.

## Which factor(s) influenced your decision to use collective procedures to gain compensation?

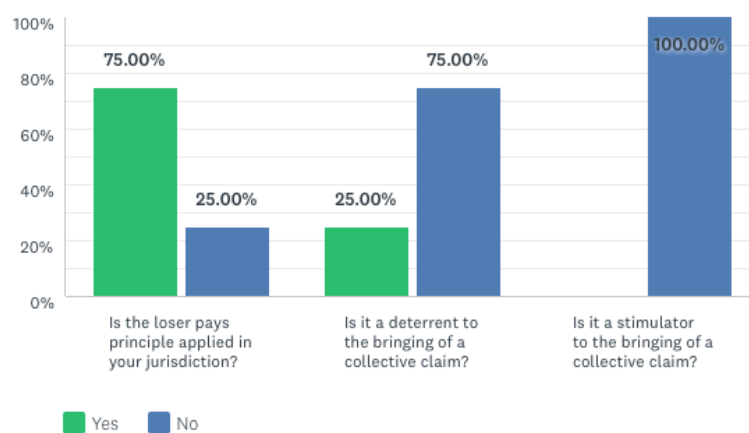
Answered: 2 Skipped: 2



In addition to substantive legal procedural aspects of collective redress mechanisms, the empirical data demonstrate that the **'loser pays principle'** as applied in the Dutch legal system does not act as a safeguard against litigation as envisioned in the Commission's Communication "Towards a European Horizontal Framework for Collective Redress".

Loser pays principle: the party that loses a collective redress action reimburses necessary legal costs borne by the winning party, subject to the conditions provided for in the relevant national law

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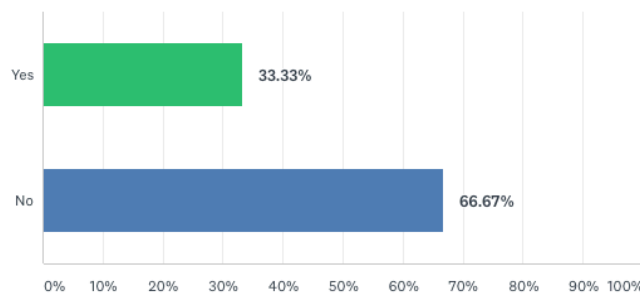
Interviewee comments highlight that a loser in litigation pays modest sums in case of a loss (for example, € 50,000 would be considered very high). Furthermore, in one respondent's experience, the losing party is usually ordered to pay only the fixed costs of the winning party and these fixed costs do not represent, and are usually much less, than the actual costs. Therefore,

the 'loser pays principle' is an ineffective deterrent to the commencement of a collective claim. Conversely, one respondent was of the view that the Dutch 'loser pays principle' is designed to not be an obstacle to access to justice. Whilst there is a mixed view of the impact of the loser pays principle, the divergent opinions nonetheless explain why all respondents consider the 'loser pays principle' as a stimulator to the bringing of a collective claim.

As to the **cost of proceedings**, the empirical data show a mixed picture for the methods of paying lawyers' fees. Of the four respondents, three respondents used a mixed/success related method, and one charged fees on a flat fee basis. For the litigation funder, the business case for litigation funding is uncertain, because there is no guarantee that a litigation funder will be allowed to (fully) recover its fee. This respondent was of the view that success related agreements are useful in litigating mass claims. In particular, the respondent was of the view that "lawyers should have their interests aligned with those of the financier and the claimants (they should have 'skin in the game'), which they have to with success-related arrangements." As to the impact of **court fees**, the majority of respondents were of the view that these were not a deterrent to the bringing of collective claims.

Are court fees a deterrent to the bringing of a collective claim?

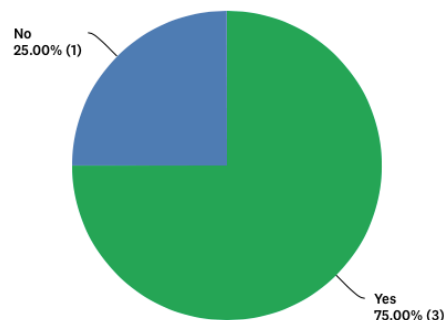
Answered: 3 Skipped: 1



The empirical data demonstrate that the majority of respondents are of the view that Dutch collective redress mechanisms **are effective methods to obtain compensation**.

Are collective actions an effective method to obtain compensation?

Answered: 4 Skipped: 0

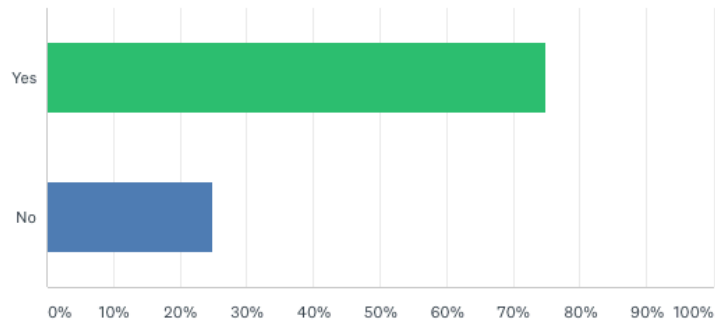


For the single respondent who provided open comments, the pooling of resources and sharing of litigation costs was the rationale for their 'yes' choice.

The empirical data suggests that it is possible to rely **on an injunction order in a subsequent individual action for damages.**

Is it possible to rely on an injunction order in a subsequent individual action for damages?

Answered: 4 Skipped: 0

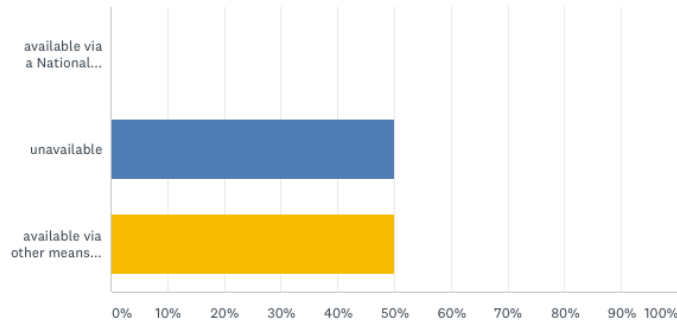


The impact of this possibility varies according to the type of respondent. The defendant respondent was of the view that a declaratory judgment from a collective action enables individual claimants to subsequently start up quantum proceedings, even without the likelihood of any damage in their case. The negative consequence of this is that it can be used to force a defendant to settle even when there is no legitimate claim. However, the litigation funder highlighted that one advantage is that a claimant does not have to redo the 'merits', although an injunction order is based on a temporary assessment of the merits. At the same time, this highlights the relative uncertainty of an injunctive ruling and a possible disadvantage. A 'merits' panel may view a compensation case differently from the injunction judge and may assess the merits differently from him.

The empirical data show that all respondents are of the view that **sufficient information is available that collective redress mechanisms exist** in The Netherlands. However, as it concerns information about ongoing proceedings, the respondents were mixed in their response.

## Information about ongoing collective redress proceedings is

Answered: 4 Skipped: 0



The data suggest that no information is available via a National Registry and where available these are via dedicated websites, online media and/or specialized press outlets.

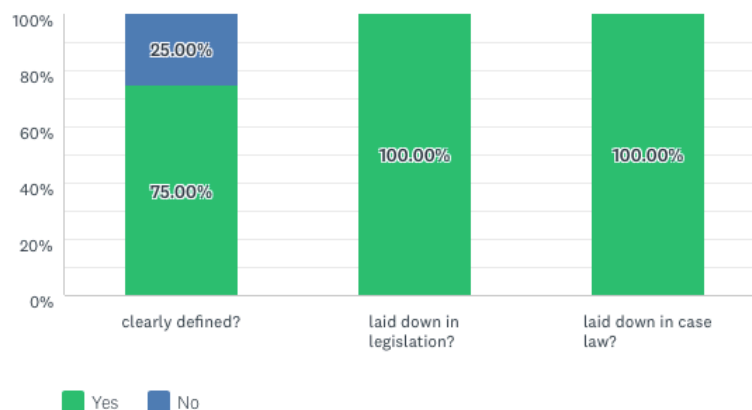
As it regards the **use of settlements**, the empirical data show that 75% of respondents have experience of resolving claims via settlement. Of this percentile, the litigation funder and a defendant/potential defendant resolved 0-29% of their claims via settlement and the legal practitioner representing defendants resolved 30-59% of their collective claims via settlement. It is not clear from the data whether these settlements were reached prior to the start of legal action via the SPV mechanism or via start of the collective action procedure or via the WCAM procedure after a collective action procedure. At the time of interview, settlements were not (yet) reached in pending cases for the litigation funder.

In the use of settlements to resolve claims, 2 respondents were of the view that the **rights and interest of all parties were adequately protected**.

As it concerns the **rules for standing** in representative claims, the empirical data demonstrate that all respondents were of the view that the rules were laid down in law.

## Are conditions for standing to bring representative actions

Answered: 4 Skipped: 0



However, there are concerns about the clarity of the conditions. Half of the respondents to this question were of the view that the court's interpretation of the conditions for standing were open to interpretation and one respondent was of the view that the case law from the Supreme Court is very liberal.

As for **general comments**, the defendant stakeholders significantly highlight that: a) The threshold for taking part in a collective action in the Netherlands is (too) low. b) Initial costs for an individual claimant are low. c) There is no authority (as, for example, in the UK) that first certifies that a claim is eligible before it can proceed. The defendant respondent also expresses a strong concern about the increasing use of third party litigation funding and funding from NGOs or, even via subsidies, by the Dutch State to bring claims.



# POLAND

## I. Overview

Polish civil procedure contains both (1) a class action procedure of judicial nature (albeit not available in all areas of law), injunctive and compensatory, and (2) a representative injunctive procedure of an administrative nature in consumer cases. The latter can concern collective consumer interests or unfair contractual clauses.

Class actions were established by the Act of 17 December 2009 (Class Actions Act), in force since 19 July 2010. The Class Actions Act is in the process of being amended and some important aspects of the procedure will very soon be changed. The Act of 7 April 2017 (referred to as '2017 amendment') was published on 12 May 2017 (item 933).

The **Class Actions Act**, as it stands covers consumer protection claims, product liability claims, and tort claims with the exclusion of claims for the protection of personal interests, i.e. personal injury claims could not be brought under the Act. The 2017 amendment widens the scope to include certain claims between business as well as declaratory relief in personal injury claims.

The class action procedure can be used for bringing compensation claims or, in cases where monetary damages are at stake, liability-only (declaratory relief) claims. Class actions can also involve requests to refrain from certain activity or activities (therefore having the same aim and potential result as injunctive proceedings).

The class representative in Poland is the 'named party' who brings the case in his own name but on behalf of all class members. The Act limits the persons who can represent the class to two categories: class members and the regional consumer ombudsmen. The Class Actions Act does not allow class representatives to obtain legal aid (which in Poland consists of legal assistance nominated by court and a waiver of court fees). Most cases are self-funded privately by each class member. Third party funding is not prohibited and is at present unregulated.

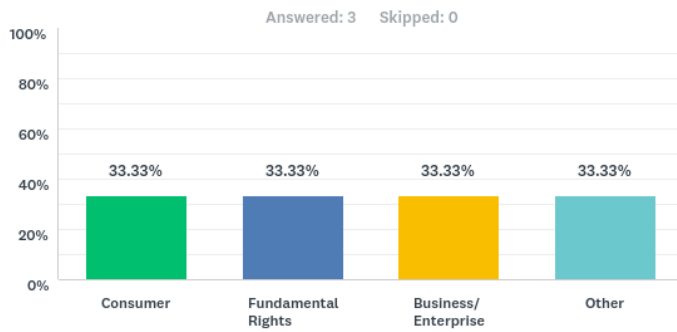
In the first stage of the proceedings, the court notifies the defendant of the lawsuit, and considers whether all the requirements have been met (at least ten people with claims of the same kind and with the same or similar factual basis) and thus whether the class action can be certified. After the class certification decision is final, the court issues a statement on the commencement of the class action, including information that potential class members can join the class within a period specified by the court. The Polish Class Action procedure is an opt-in procedure.

The Class Action Act requires that class members who have monetary claims make them equal with the other class members. This standardisation requirement means that those who decided to opt in may sometimes need to modify their claims to make them equal with the others. The standardisation requirement constitutes an exception from the principle of full compensation, and is criticized as unconstitutional. It causes many substantive and procedural problems for class members. Lawyers representing class members

report that they advise them to limit the claim to declaratory relief only, and then follow the injunction with individual compensatory claims.

## II. Data

The following **empirical data** were gathered from a lawyer representing claimants, an organisation representing claimants, and an organisation of employers. Their fields of expertise cover the following areas:

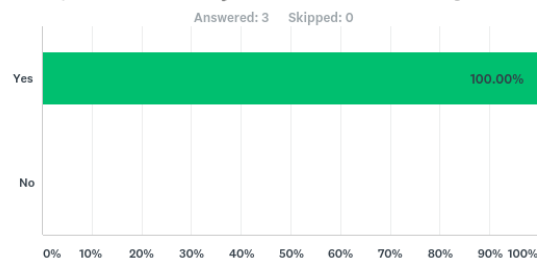


Have you been involved in collective redress (as claimant, claimant lawyer, other) or are you envisaging such involvement?



One third of the respondents have been directly involved in collective redress, although they mention the cases in which they are involved are still pending. The other stakeholders have experience of collective redress through contacts with representative entities. One organisation potentially representing claimants also mentions they have not been involved or provided representation because of the costs collective redress entails. Lacking the necessary resources is thus a major issue.

In your opinion, is access to justice enhanced by collective redress?



All of the respondents agree that collective actions ensure **fairness of proceedings**, and that **access to justice** is enhanced by collective redress. The support of the group, the increased bargaining power, the mere existence

of an additional “option” to bring a claim, are cited as reasons why. The stakeholders remain however unsure whether collective actions are an effective method to **obtain compensation**. It appears that, so far, the cases brought have not led to compensation, and some cases are still in the first stages. Compensation is thus an issue that remains to be determined.

In terms of burden and **length of proceedings**, a respondent points out that non collective cases brought before the court of first instance last around two years, while the first stage of a collective action (decision on admissibility) also takes up to two years. The length of the proceedings might thus be an important setback.

General remarks from stakeholders indicate that the efficiency of collective redress in Poland remains to be proven. So far, collective cases have not led to compensation, and they take some time. Some steps are being taken to widen the scope of application of the current mechanism.

# PORTUGAL

## I. Overview

Portugal has a general collective redress mechanism which is supplemented by specific standing rules in consumer law, financial market law and environmental law. In addition, there are procedures specific to the administrative courts which are designed to deal with mass claims on a 'test case' type basis.

### *General*

Law 83/95 of August 31<sup>st</sup> established the so-called *acção popular* or popular action which constitutes the general collective redress regime in Portugal. Although its application is not expressly limited in scope it is primarily available to protect interests relating to public health, environment, quality of life, consumers, cultural heritage and public domain. Once admitted, a popular action proceeds according to the general rules of civil procedure set out in the Code of Civil Procedure which is supplemented in group claims by Law 83/95. The claimant may therefore obtain all the remedies which would ordinarily be available in civil actions, including compensatory damages and injunctions as well as declaratory and interim relief. However, this approach has its limitations, for example, there are no specific rules concerning the enforcement judgments rendered in popular actions or collective settlements entered into by the parties.

Any individual or association with legal personality may bring a popular action as a representative regardless of whether they have a direct interest in the dispute. There are no formal rules on **standing** and the only requirements for associations bringing claims is that they do not have a conflict of interest and that their articles of association state that one of their purposes is the defending of the relevant interests at stake. In addition, local authorities have standing regarding the interests of their residents and the Director-General for Consumers may bring an action where consumer rights are in question.

Under Articles 31 and 32 of the securities code a popular action may be brought for the protection of the homogenous individual interests or the collective interests of investors in securities. Such claims may only be brought by non-institutional investors and associations acting on their behalf.

The Public Prosecutor plays an important role in regulating the conduct of the representative claimant and is responsible for protecting the interests of the group members. It may intervene in a popular action to remove and/or replace a claimant whose actions are damaging to the interests at stake or are otherwise contrary to the best interests of the group. It may also appoint a replacement where a claimant withdraws from the action.

**The popular action works on an opt-out basis.** Following the filing of the claim the interested persons are notified and have a specified period in which to respond, those that do not respond are deemed to have opted-in to the proceedings. Notification may be by way of direct communication or by public notice through local and/or national media.

There are few options for **funding** a collective action and the burden falls primarily on the claimant itself. Whilst third party funding is not prohibited in

Portugal it is very rarely used and is not widely available. Furthermore, no assistance can be found from law firms since lawyers are prohibited from entering into conditional and/or success fee agreements by the Bar Association Statute.

### *Administrative Law*

The reforms of the Administrative Court which entered into force in 2004 introduced the concept of 'mass process' into the Code of Administrative Procedure under Article 48. This is a type of test case mechanism which is designed to accommodate large numbers of related claims being brought at any one time. Where more than 20 claims are initiated which are closely related, for example, because they relate to the same legal relationship or concern the same rights, the court may order that only some of the claims are to proceed to trial, with the remainder being stayed pending the outcome. The final judgment will then, following the fulfilment of certain specified criteria, be binding on all the previously stayed claims.

Information on collective redress in Portugal was gathered from sources who primarily have experience in consumer law. None of those who engaged with the project had brought or defended a collective action and therefore their responses were extremely limited. This reflects the overall picture of collective redress in Portugal, that whilst there are extensive procedures set out in legislation they are rarely used in practice.

## **II. Data**

The participants in the survey considered that rules on collective redress are clearly set out and defined in legislation. There was no indication from the participants that they would not make use of these procedures when appropriate but had not done so to date primarily due to the narrow scope of the rules and the lack of a specific collective redress regime in their fields of practice.

All the respondents considered that there is **sufficient information** on the existence and availability of collective redress mechanisms in Portugal. However, in the absence of a national registry of collective claims information on ongoing proceedings is considered to be unavailable, in part this may be due to the very small number of collective claims.

Q19 Are conditions for standing to bring representative actions



In respect of fees and costs, the respondents did not cite court fees as a significant issue discouraging claimants from engaging in collective redress. The loser pays principle applies to collective proceedings, this was not considered to be a deterrent to bringing proceedings and one respondent considered it to be a stimulator to bringing proceedings.

None of the respondents had any specific comments on the Portuguese legislator's choice of the opt-out mechanism to govern collective proceedings.

One specific weakness with the current collective redress system identified by the participants is the potential additional burden on defendants. Since Portuguese law does not distinguish between a group claim and a regular claim and applies the same procedural law to both, a defendant is required to meet the same deadlines regardless of the fact that there may be hundreds of different claimants involved in the proceedings.

# ROMANIA

## I. Overview

There are no general collective redress mechanisms in the Romanian legal system. However, sectoral collective actions are possible. These actions are available in consumer law and are for injunctive relief only. Collective claims can be commenced by certain associations for the protection of consumers, on behalf of consumers, and by the National Authority for Protection of the Consumers on behalf of bank clients for contractual clauses deemed to be abusive.

Representative consumers associations ("RCPA") can bring legal actions to defend the legitimate interests and rights of consumers (Art.37, letter h of Government Ordinance no.21/1992 ("GO 21/1992") regarding the consumers protection). In this injunctive relief action, the judge will not touch upon the substantial merits of the claim, but it would only assess if prima facie there is a possibility that damage occurred and may continue to accrue. Additionally, the National Authority for the Protection of Consumers ("NAPC"), a public institution, is empowered by Law 193/2000 to bring claims regarding abusive clauses in agreements concluded between professionals and consumers. Consumers are not part of both of these proceedings, although in principle they are able to join via the voluntary intervention, as mentioned below.

In addition to the sectoral mechanisms, the Romanian Civil Procedure Code ("RCPC") provides legal mechanisms allowing multiple participants in court cases, of whatever nationality, under the term of "co-participation in the case" (articles 59-60 of RCPC) and "voluntary intervention in a case" (articles 61-67 of RCPC). Both injunctive and compensatory relief are available in these mechanisms. In Co-participation, several persons may be together plaintiffs or defendants if the case refers to a common right or obligation, if their rights or obligations have a common cause or if between these there is a close connection. In voluntary intervention, an intervention in support of the rights of its author, or ancillary or in support of the main plaintiff is allowed.

As to remedies, the RCPC prohibits punitive and/or extra-compensatory damages. In case of joint actions introduced by undertakings, compensation can include the non-realised profit (*lucrum cessans*), in addition to the effective damage (*damnum emergens*). It is possible to seek an injunction and compensation in a single action. However, the injunction is of an interim nature.

As to costs, Romania follows the 'loser pays' principle. There are no exemptions to the principle but the court may order a reduction of the lawyers' fees to be paid, if these are deemed excessive. Third Party funding not regulated. Contingency fees are, as a matter of principle, prohibited by the Lawyers Statutes. However, success fees are becoming frequent and can be used to circumvent the prohibition.

Romania has not implemented the Commission's Recommendation and there are no current legislative proposals in this respect. According to the Romanian Ministry of Justice and the National Authority for the Protection of

Consumers, such proposals might be put forward in the second semester of 2017.

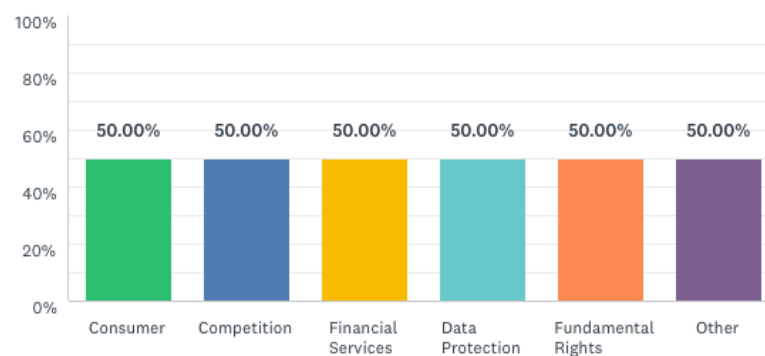
## II. Data

The following empirical data were gathered from 3 judges. Two-thirds of these respondents also had experience of being involved in collective redress as claimant or claimant lawyer. Despite the number of total respondents, only one respondent answered the majority of questions and this response rate should be taken into account when drawing conclusions on the impact of the collective redress mechanisms.

The fields of expertise of two-thirds of respondents are:

Please select your field of expertise

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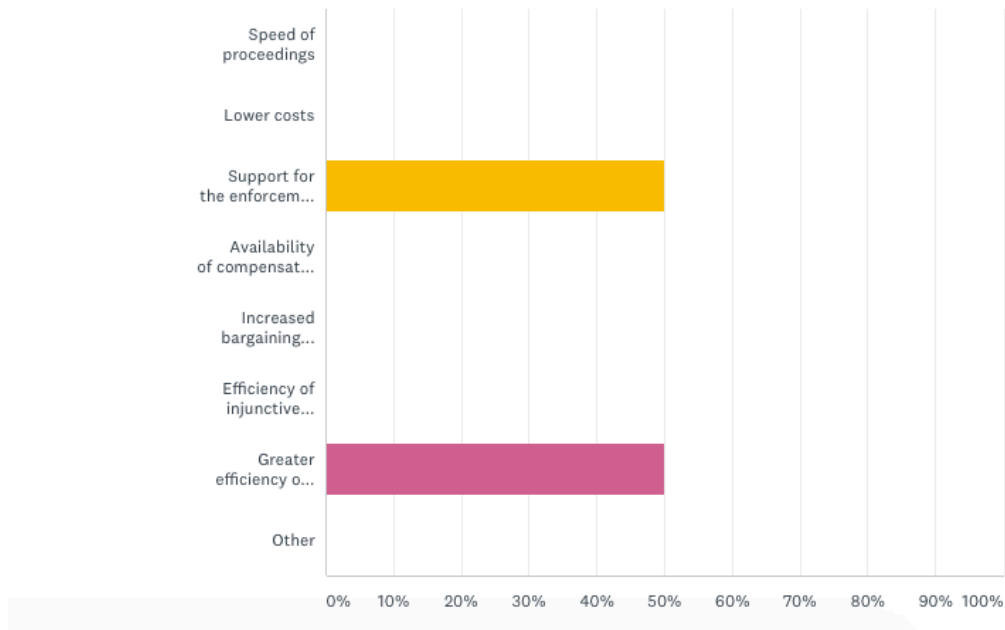


Romanian law does not provide for a specific horizontal collective redress, as reflected by the personal experience of the respondents. Despite the absence of a horizontal mechanism, respondents find practical advantages in the existing mechanisms for compensation claims.



## Which factor(s) influenced your decision to use collective procedures to gain compensation?

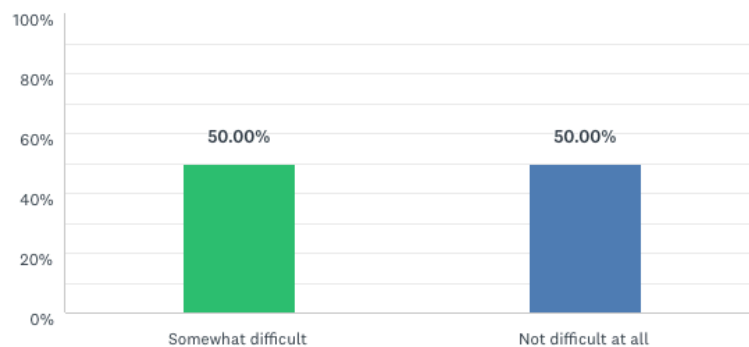
Answered: 2 Skipped: 1



However, the benefit of these advantages seems to be counterbalanced by procedural obstacles. The empirical data demonstrate that one third of the respondents found some difficulty in gaining compensatory relief.

## How difficult have you found gaining compensatory redress in mass claims?

Answered: 2 Skipped: 1



A similar picture is gleaned for injunctive relief.

## How difficult have you found gaining injunctive order?

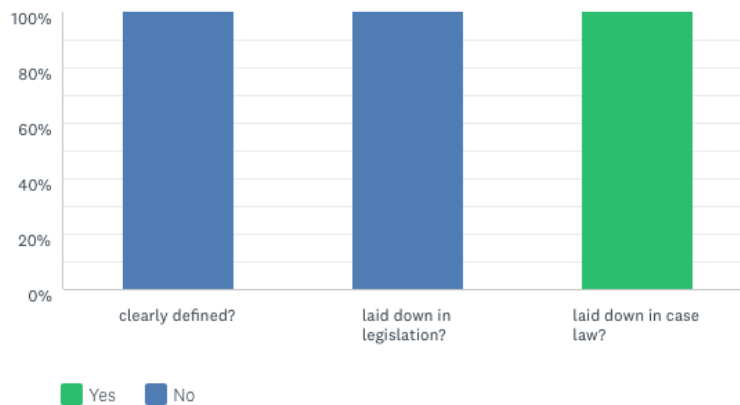
Answered: 1 Skipped: 2



The stakeholder identified the oral nature and the publicity of the proceedings as the reason for their choices. Additional factors relevant to this 'difficulty' conclusion seem to be: conditions for standing in representative claims and the efficiency of cross border collective redress

## Are conditions for standing to bring representative actions

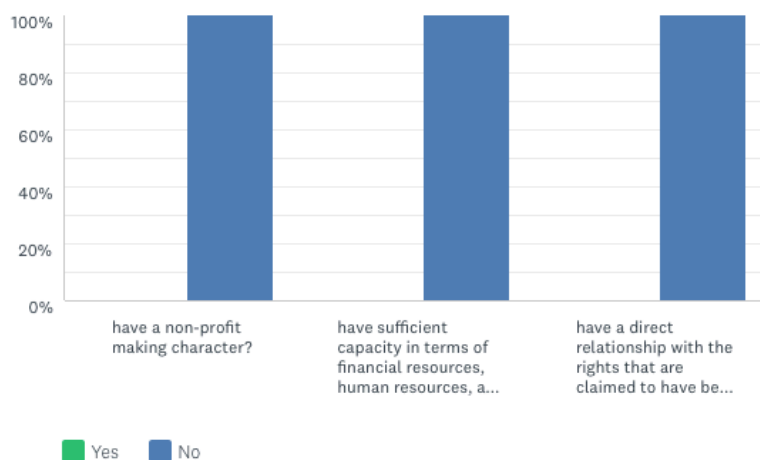
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A factor which exacerbates the consequence of this ambiguity of conditions seems to be the absence of specific financial and administrative requirements for a representative to be entitled to bring a claim.

## Are representative entities required to

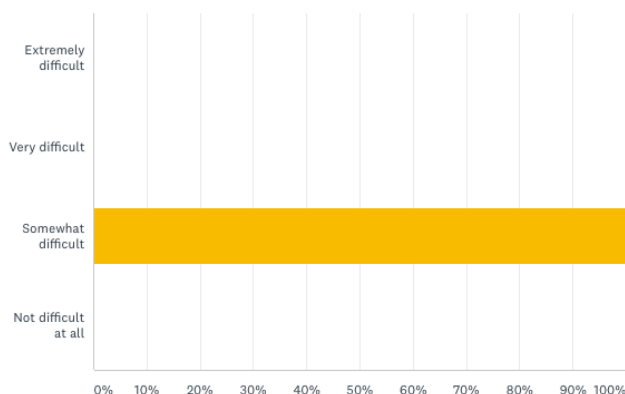
Answered: 1 Skipped: 2



In addition to the above, the respondent's experience of cross border collective redress is not dissimilar.

How difficult do you find cross-border collective redress in compensatory cases?

Answered: 1 Skipped: 2



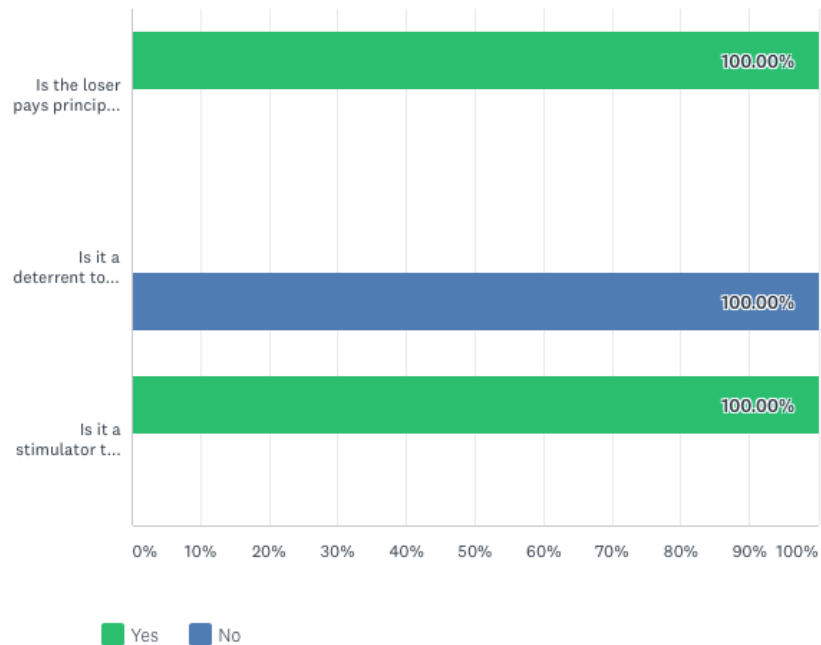
Cross border collective redress in injunctive cases is of even higher difficulty. The respondent who answered this question found cross border collective redress in injunctive cases 'very difficult'.

Unfortunately, the respondent did not specify particular problems encountered with EU cross-border collective redress or further explanation as to their selection on standing and difficulty in compensatory and injunctive cases.

As for the loser pays principle, the data show that the Romanian rules do not act as a safeguard or filter of claims.

Loser pays principle: the party that loses a collective redress action reimburses necessary legal costs borne by the winning party, subject to the conditions provided for in the relevant national law

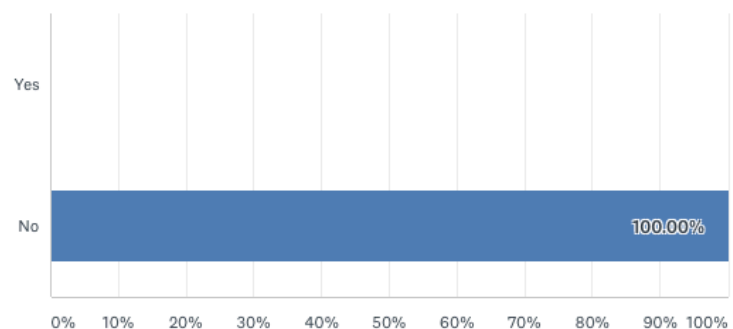
Answered: 1 Skipped: 2



This absence of deterrence can also be seen in the rules to court fees.

Are court fees a deterrent to the bringing of a collective claim?

Answered: 1 Skipped: 2



The respondent who answered this question mentioned that court fees are not charged in collective claims.

In light of the above, the empirical evidence demonstrates that one third of stakeholders do not consider Romanian collective redress mechanisms to have a clear benefit/detriment upon access to justice and fairness of proceedings. In particular, one third of respondents are of the opinion that access to justice and fairness of proceedings 'maybe' improved by the current

collective redress mechanisms. As with some of the choices above, the respondent did not specify particular problems or further explanation as to their selection.

# SLOVAKIA

## I. Overview

At present, there is no comprehensive approach to collective redress in the Slovak Republic and no generic collective redress mechanism. Some elements of collective protection of rights can be found in the procedure for representative actions as well as in sectoral provisions relating to consumer protection.

In the Code of Civil Procedure (Act No. 160/2015 Coll., Civilný súdny poriadok - CSP), there are traces of collective redress in the provision of § 126 CSP. This provision contains specific rules for mass/collective judicial claims where at least 10 submissions are addressed to the same court by the same entity during one day. However, at a closer look, the legislation does not display any of the features of collective judicial protection. The provision is merely the reaction to some practical problems associated with the administration of mass claims.

More solid features of collective judicial protection can be found in the rules on the so-called abstract control in consumers' claims according to section 301 et seq. CSP. The provision gives *erga omnes* effect to judicial decisions relating to unfair contractual terms or unfair competition.

Some special legal acts provide for the distinct role of specialised bodies in judicial proceedings (representative entities) authorising them to initiate selected types of procedures (the rightsholders are not parties to the dispute). Despite the limitation of standing of such entities, proceedings follow the classical principles and rules of civil contentious proceedings without any special features or distinctions. Moreover, some of these proceedings involve a widespread application of *lis pendens* and *res judicata* principles.

The only relief that may be granted in the proceedings described above is an injunction restraining further defendant's conduct or the removal of unlawful situations.

The recovery of consequential damages takes place in separate proceedings independent of each other. This leads to an inefficient use of judicial resources and potentially divergent decisions.

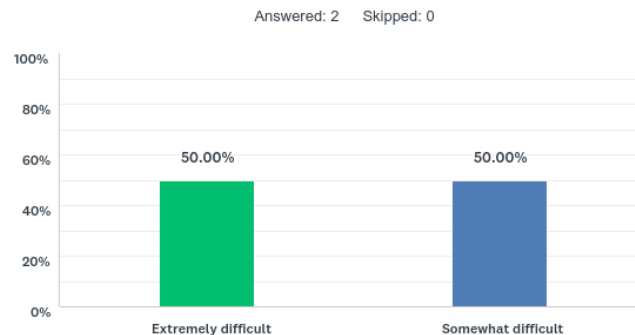
## II. Data

The participants in the survey are a lawyer covering a broad range of practice areas and an association representing consumers across various subject areas. The lawyer has been involved in a mass investment fraud case, representing claimants.

The participants criticised the fact that there is **no proper mechanism for compensatory collective redress**. It was stated by both that the recovery of mass damages is difficult (one respondent found it **extremely difficult, one somewhat difficult** – and both found it extremely difficult in **cross-border** cases) and involves long and costly proceedings. One additional

reason mentioned for not seeking collective redress was the lack of a funding system.

Q12 How difficult have you found gaining compensatory redress in mass claims?



Similar difficulties have been reported as to **injunctive** orders (they have been considered by one respondent as somewhat and by the other as extremely difficult, especially in cross-border cases) although injunctive redress was in general seen as a potentially useful means of mass redress if efficiency and speed of proceedings are guaranteed. The duration of the proceedings and costs were quoted by one respondent as reasons for the current difficulties. Moreover, it was stated by both respondents that an injunction and compensation cannot be sought in the same action.

**Standing** can be with the lead plaintiff, the claimants' lawyer or an association, depending on the type of claim brought (injunctive or compensatory relief). In practice, respondents reported that no foreign plaintiffs have been involved in either type of claim and the respondents' comments indicate that foreign claimants cannot join proceedings and that cross-border collective redress would be extremely difficult. Criteria for representative entities seem to be clearly defined although respondents gave divergent answers as to whether or not they need to be certified. It was reported that there is no public list of entities.

Respondents described the **fees structure** from their practical experience as either a flat fee or mixed/success related fee. It has also been stated by both respondents that contingency fees would affect the decision whether or not to bring proceedings via a collective action. Court fees have been seen as a deterrent to bring a claim by one respondent.

There are **no established funding structures** or specific rules on third party funding. Respondents gave different replies as to a potential influence of funders. While both respondents stated that no conflict of interest has arisen in practice, one explained that a funder had tried to unduly influence the claimant party by intervening in procedural decisions. Nonetheless, respondents considered it rather likely to very likely to bring collective actions in light of/ despite the internal rules on third party funding.

As to the **advantages and disadvantages** of collective redress, neither respondent thought that **access to justice** is enhanced by collective redress nor that collective actions ensure fairness of proceedings. One respondent suspects that collective redress has a rather negative impact on the courts, enhancing the burden as compared to non collective actions. It has to be

added though that they stated **not to have trust** in the court system generally.

Their opinion is split on the question whether there are **risks of abusive litigation** and whether collective actions are an **effective method to obtain compensation**. One respondent reported instances of abusive litigation (“adjournment of a trial by the opponent by constantly submitting objections against legal decisions”).

Both respondents stated that there is **insufficient information** about collective redress in the Slovak Republic (although consumers would be reasonably informed about injunctions) and that the creation of additional public bodies or the reorganisation of existing public bodies would be needed to enable collective redress.

Although overall, respondents did not believe that collective redress procedures have an impact on business competitiveness, investment or trade, one respondent stated that collective redress mechanisms **would substantially affect prices** that consumers pay for goods in their jurisdiction and both respondents agreed that collective redress would **not necessarily enhance consumer trust**. One respondent thought that collective injunctive and compensatory relief increases the burden on the courts and procedures would take more time. One respondent thought that national collective redress legislation can impact on consumers’ ability to benefit from the internal market and international competition and that prices would significantly rise. Also, one respondent stated that collective actions would require the creation of additional public bodies or the reorganisation of existing public bodies.



# SLOVENIA

## I. Overview

Slovenia has not yet enacted a general act on collective redress, however, the Civil Procedure Act does contain measures regarding the joinder of claims (Sl. *atrakcija pristojnosti*, e.g. Art. 49), joinder of proceedings (Sl. *združitev pravn*, Art. 30), as well as, as of 2008, a so-called "model procedure" (Sl. *vzorčni postopek*, Art. 279b). Although dealing with multiparty litigation these mechanisms do not allow an action to be brought by a representative claimant; rather, they simply seek to case manage existing claims together in a more efficient and economic manner.

In addition, there is a sectoral collective redress regime for consumers under the Consumer Protection Act. However, this action is limited to injunctive relief and only in respect of specified breaches.

It is expected that a broader mechanism of collective redress will soon be established in Slovenia. The Ministry for Justice has prepared a Proposal for a Collective Redress Act (the 'CRA Proposal'). The proposal is based on the Commission's Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.<sup>21</sup> The CRA will enter into force six months after its publication in the Official Gazette of RS (presumably sometime in 2018) and will apply to events of mass damage occurring after the entry into force of the act. The new act is supposed to serve as a basis for collective redress (injunctive and compensatory) in specific civil, commercial and labour law matters, namely regarding:

1. the claims of consumers arising from contractual relationships with businesses as they are specified by the act regulating the consumer protection or another act;
2. the claims arising from the violations of other consumers' rights granted by the act regulating the consumer protection;
3. the claims arising from the violations of the provisions on antitrust from Articles 6 and 9 of the Prevention of Restriction of Competition Act<sup>22</sup> and Articles 101 and 102 of the Treaty on the Functioning of the European Union<sup>23</sup>;
4. the claims regarding the violations of the rules regulating the trade on organized markets and regarding the prohibited actions of market abuse under the act regulating the financial instruments market;
5. the claims of workers which would, as a separate action, be handled with in an individual labour dispute, as it is defined by the act regulating the proceedings at labour courts.

In the field of protection against discrimination, only injunctive collective actions will be provided for.

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<sup>21</sup> OJ L 201, 26 July 2013, pp. 60–65.

<sup>22</sup> Zakon o preprečevanju omejevanja konkurence (ZPOMK-1), Official Gazette RS, No. 36/2008 with further amendments).

<sup>23</sup> OJ C No. 326 of 26 October 2012, p. 47.

In the CRA proposal, the Ministry explained that, given the lack of experience with collective redress in Slovenia, it was deemed appropriate to first introduce such an action in disputes where this is (at least partly) obligatory under the EU legislation (i. e. in consumer disputes) and those where mass harmful events are the most common.<sup>24</sup>

Currently, collective redress is only available in consumer cases. This is provided for by the Consumer Protection Act (the 'CPA')<sup>25</sup>. This Act regulates collective injunctive actions against defendants who, in concluding consumer contracts, act in violation of certain legislative provisions (Arts. 74 to 75), and a collective action for declaration of nullity of certain contracts, contractual provisions or general contractual conditions in contracts that the defendant concludes with consumers (Art. 76). Both types of actions can be filed by specially qualified consumer organisations. No collective action is provided for (directly) seeking financial compensation. The judgments in injunctive collective redress under the CPA only have an *ex nunc* effect (effect for the future) and only the organisation who was the plaintiff can demand enforcement of such a judgment.<sup>26</sup> On the contrary, the action for declaration of nullity of contracts, certain contractual provisions or general conditions, provided for in Art. 76 of the CPA (by which Slovenia broadened the availability of collective redress in comparison with the demands of the Directive 2009/22/EC) is designed to protect consumers in already existing contractual relationships. The consumer will still have to file a separate claim to obtain compensation, but the court will be bound by the decision on the preliminary question of the nullity of contractual provisions, adopted in the judgment issued in the collective procedure.<sup>27</sup> It must, however, be emphasised that judgments are only binding if the business was condemned and the contracts were declared null and void; in case that the consumer organisation lost the proceedings, the consumers can, in individual proceedings against the business, still assert that the contract, contractual provisions or general conditions are null and void.<sup>28</sup> Such judgment is also not binding with regard to other consumer organisations which can later file actions aiming at the declaration of nullity of the same contractual provisions.<sup>29</sup> Upon future adoption of the Collective Redress Act (hereinafter CRA), collective redress in consumer matters will be regulated by this general act and the said provisions of the CPA will be abolished.

The Slovenian Environment Protection Act<sup>30</sup> also provides for an injunctive collective action against a defendant who is causing damage to the environment. Such an action can be filed by an organisation which represents a group of injured persons and does not act solely on its own behalf.<sup>31</sup>

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<sup>24</sup> CRA Proposal, p. 14.

<sup>25</sup> Zakon o varstvu potrošnikov, Official Gazette of the Republic of Slovenia, No. 20/1998, with further amendments.

<sup>26</sup> Galič, pp. 220, 221.

<sup>27</sup> Cf. Galič, p. 222.

<sup>28</sup> Galič, p. 223.

<sup>29</sup> Ibidem.

<sup>30</sup> Zakon o varstvu okolja (ZVO-1), Official Gazette RS, No. 41/04 of 21 April 2004.

<sup>31</sup> For more on this remedy, see Damjan.

## II. Data

As there is currently no established system of compensatory collective redress in Slovenia, participants were unable to give answers based on their own experiences of these procedures. Furthermore, to date there have been no collective actions brought under the existing CPA mechanism. Therefore, the participants' answers to the survey were limited and confined to giving comments on the future of collective redress under the CRA.

One of the interesting features of the new regime is that it allows a choice between the opt-in and opt-out systems, the participants did not consider this a sensible choice by the legislature. One participant who gave detailed comments thought that it would be preferable to have a solely opt-out system since consumers frequently do not engage with opt-in cases. Furthermore, they considered that maintaining both systems adds an unnecessary element of complexity to proceedings and were uncertain as to how the courts would decide which system to apply in practice.

One of the major consumer organisations in Slovenia, who had provided comments to the government during the drafting of the new regime did not feel that the concerns they had raised had been fully addressed in the final version. One major area of concern for them was funding, particularly in the pre-issue stage of proceedings. This is not addressed in the CRA and it is anticipated that the representative organisation would shoulder the financial and logistical burden of managing and establishing the group. The concern of the consumer organisations is that this without proper resourcing and more detailed guidance on the organisation of claims the numbers of collective actions that can, in practice, be brought will be limited.

Despite their reservations about the new system the same consumer organisation stated that they would certainly use it in order to gain redress for consumers. They felt that the lack of such a system was a gap in the law and left consumers without a means of obtaining redress. In their experience, the alternative of bringing individual was not economical or effective in low value consumer claims and since the CPA only allows claimants to injunct defendants from continuing harmful conduct, it cannot provide redress for consumers who have already been affected. The CRA is therefore, on the whole, regarded as a welcome and overdue reform of the law.

Given that the CRA proposal is almost exclusively modelled on the Commission Recommendation it will be interesting to monitor the impact of its implementation and whether this leads to an increase in the number of parties seeking collective redress in Slovenia. However, it is clear from the comments of the participants that ultimately the success of the CRA will depend not only on the system itself but also on the willingness and ability of consumer organisations and third parties to fund collective claims.

# SPAIN

## I. Overview

Collective redress in Spain is primarily available in consumer law cases under the provisions of the Code of Civil Procedure, enacted in 2000. Whilst originally intended for the protection of consumers, these provisions are not solely limited in application to consumer cases and are considered rules of general application which form the framework for collective redress in Spain. These rules are supplemented by separate, sectoral, rules dealing mostly with standing in competition law, equality law, environmental law and labour law. The following comments and analysis focus on collective redress in consumer claims.

In addition to the specific rules on collective redress it is also possible to join claims of any type which are similar in nature under the regular rules of civil procedure, at the discretion of the court. The claims must be identical or connected and arise out of the same facts and it must not be convenient for them to be heard separately.

Both injunctive and compensatory remedies are available in collective actions. Frequently they may be brought in the same proceedings. For example, a consumer organisation may successfully obtain an injunction nullifying a provision contained in a consumer contract and then seek compensation for the damages occasioned by that clause, relying on the injunctive order.

**The rules on standing to bring a claim vary between sectors, the type of redress sought and the nature of the group represented.** In consumer and competition cases where it is only the rights of a discrete, easily ascertainable class that have been affected standing is given both individuals and groups who have as their objective the protection of consumer interests. Such groups are required to be non-profit.

On the other hand, **only legally authorised consumer groups who are members of the Consumers and Users' Council have standing to represent the rights of consumers in general** and bring claims on behalf of undetermined groups. To become a member of the council it is necessary to fulfil certain stringent requirements set out in the General law for the Protection of Consumers and Users (GCA). Organisations which do not fulfil these requirements only have standing to represent the interests of their own members.

The rules are less complex in other sectors. Under anti-discrimination law, trade unions and other organisations whose objective is the defence of equal treatment of men and women have **standing**. Under labour law it is the trade unions which have **standing**. Both physical and legal persons have **standing** to bring claims in environmental damage cases.

**Once a collective action has been instituted individuals have the option of accepting the representation of the claimant or joining the proceedings as a party in order to individually assert their rights.** Where the claim is brought on behalf of a specified group, the claimant must identify the members and communicate with them the fact of the proceedings. Where the claim is brought on behalf of an indeterminate group the proceedings are stayed for two months to allow for the advertisement of the claim and the identification of the individuals. The court may require the

defendant to provide information and otherwise assist in the ascertainment of the group.

**It is difficult to classify the Spanish collective redress system as operating on either an opt-in or an opt-out basis.** Certainly, both options are available, and there are no legislative provisions which specifically deal with this issue. Historically, a decision in a group action is binding on all the members of the group, and thus it has been treated as an opt-out system. This does not present too much difficulty in claims brought on behalf of a limited or easy to define group since the members must be identified at the outset of proceedings. However, in claims brought on behalf of an unidentified or unspecified group of consumers this issue is much more difficult since Spanish law does not have a mechanism under which persons may formally chose not to be bound by a claim in order to preserve their individual action.

Recent case law of the Supreme court has clarified the issue somewhat, holding that in a collective action a judgment upholding the claim will only bind those absent consumers who are individually named in the judgment. Furthermore, judgments of both the Spanish and European courts have made it clear that individual consumers who are not part of the group action are not barred by *lis pendens* from bringing a separate action against the same defendant. Despite no further legislation, the jurisprudence in Spain is moving the law away from an opt-out towards an opt-in system.

There are similarly no clear rules on the **certification and/or admissibility** of claims in Spain. There are certain rules on the standing of organisations which are designed to prevent conflicts of interest and ensure transparency in proceedings. However, there are no provisions dictating the size or characteristics of the group. It is a generally accepted feature that the individual claims should have some underlying factual commonality.

**Funding** is provided either by the state through legal aid or by the consumer or user groups themselves, which may receive some state funding. Third party funding, whilst it is not prohibited in Spain, is not used. Since consumer associations are prohibited from making a profit there is no incentive for professional funders to fund cases. Similarly, because third party funding is not used it is not regulated either by the courts or by legislation and, contrary to the requirements of the Recommendation, there is no need for a claimant to disclose his source of funding at the outset of a claim. Lawyers are permitted to enter into **success fee** agreements with clients. Again, these are not expressly regulated by the courts, however, fees in excess of 30% of the value of the claim cannot be recovered.

**Information** on collective redress is provided through the media by either the consumer organisations or by order of the court at the outset of the case. There is no national registry of collective actions and in its absence, there is no other official source of information on collective redress.

Recently there has been an increased use of **ADR** in collective proceedings in Spain. Collective settlements are available under the general rules of the civil code and consumer arbitration is available under Royal Decree 231/2008. Example of ADR in collective proceedings include the system established in January this year for consumers affected by floor clauses and the intention of ADICAE to establish a collective settlement for the recovery of unduly paid mortgage costs

**The key areas of incompatibility with the Commission Recommendation are:**

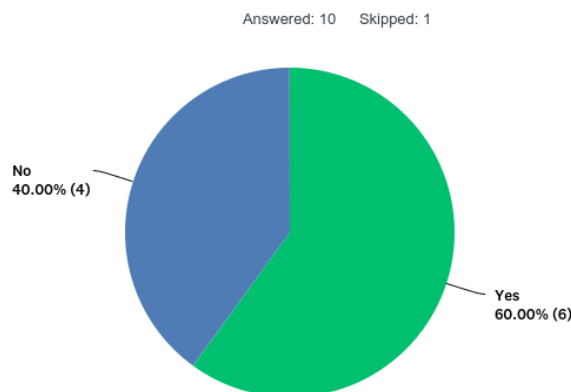
- No early determination of admissibility questions
- No national registry of collective redress cases
- There is no obligation on a claimant to disclose their source of funding at the outset of a case
- The courts do not exercise any supervision over funding agreements.

## II. Data

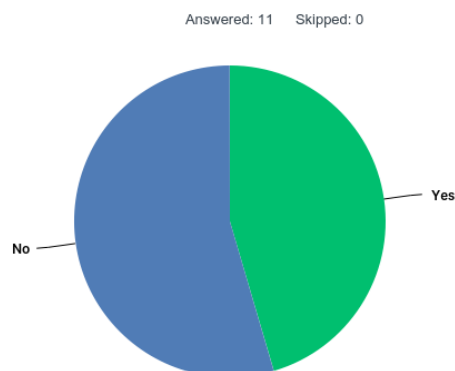
Data were collected from a broad range of practitioners and practice areas. The participants in the study included lawyers as well as organisations representing claimants, public authorities and a judge. Generally, the group specialised in consumer law with 72% of participants listing this as one of their fields of expertise, along with specialisms in financial services and business law. The makeup of the group is unsurprising and can be considered representative of collective redress in Spain, group actions have mainly been focused against banks.

Participants had experience of both bringing and defending claims. 60% of those who responded had experience of claimant work and 45% of those who responded had experience of defendant work.

Q6 Have you been involved in collective redress (as claimant, claimant lawyer, other) or are you envisaging such involvement?

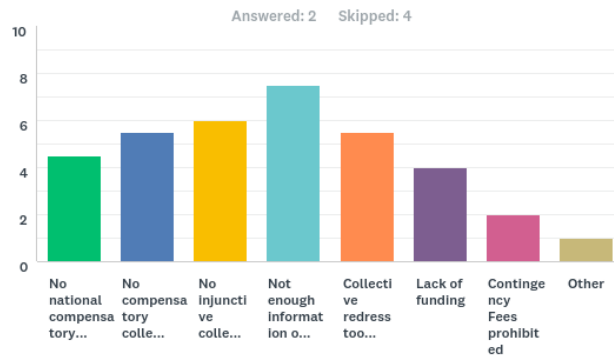


Q7 Have you defended a collective action/ been involved in collective redress (as defendant, defendant lawyer, other) or are you about to defend a collective action?



Those who had not brought or otherwise been involved in a collective action cited several reasons for not having done so, with the lack of information about collective actions being the highest ranked common factor.

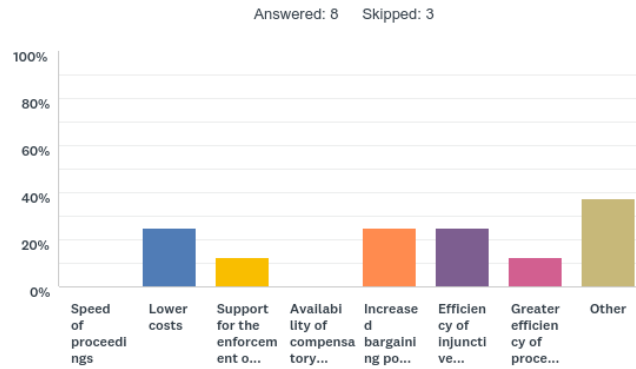
**Q11 With 1 being the predominant reason, please rank the reasons selected in question 5**



A respondent from the Spanish competition Authority cited the lack of a clearly accessible system for collective follow on proceedings as a reason for a relative lack of activity in this area. In their opinion, somewhere in the region of 40 – 50% their cases are suitable for a collective follow on action but are generally never pursued. There is co-operation between the National Competition Authority and consumer organisations with the Competition Authority passing cases on to consumer organisations following the conclusion of administrative proceedings. Spain has very recently enacted the Damages Directive into national law. The National Competition Authority was optimistic that this would increase access to collective redress and eliminate some of the difficulties which currently exist with bringing follow-on actions.

**The participants cited a variety of reasons for choosing to use collective redress in both injunctive and compensatory cases.** The main reasons were the lower costs, higher chances of success/increased bargaining power. As regards the latter, ADICAE (the Association of Depositors and Users of Banks and Savings Banks of Aragon) one of the most active organisations in collective litigation in Spain, stated that collective injunctions were, in practice, the only effective way to seek redress against banks and financial institutions. In individual actions, the resources of the banks would more than likely prevail over consumers. This was echoed by other claimant lawyers and organisations and indeed the efficiency of injunctive relief was one of the most cited reasons for using collective proceedings.

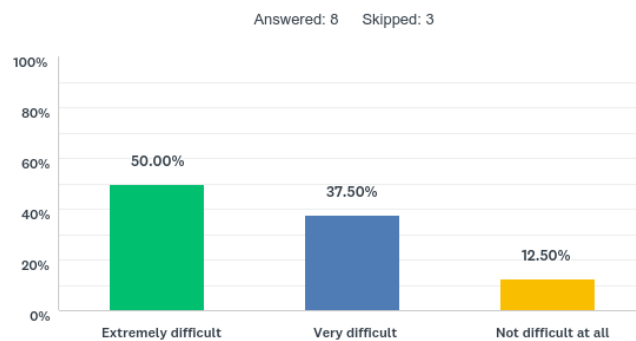
Q17 Which factor(s) influenced your decision to use collective procedures to gain compensation?



From the defendant point of view, one lawyer felt that consumer organisations often acted out of a sense of social or political obligation in order to curtail banking practices they did not agree with.

Nevertheless, it is clear that there are **significant difficulties** in seeking collective redress in Spain. 50% of the participants rated collective redress as 'extremely difficult' in compensatory actions and 85% rated it as 'very difficult' to obtain an injunctive order. The participants were almost unanimous in finding the system difficult, this included one participant who is a judge. Only one participant, a defendant lawyer, found the system easy to use. It is interesting to note that whilst both compensatory and injunctive actions were considered difficult to use the data suggest that an injunctive order is more straightforward to obtain than compensation. The potential reasons for this are considered below.

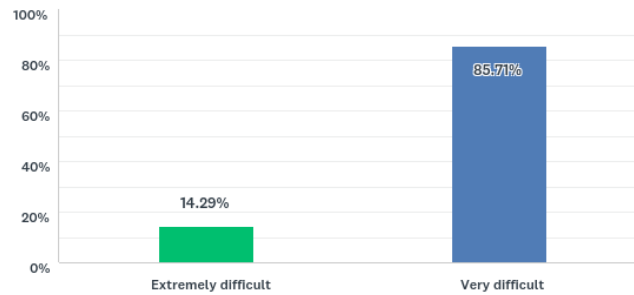
Q12 How difficult have you found gaining compensatory redress in mass claims?





### Q13 How difficult have you found gaining injunctive order?

Answered: 7 Skipped: 4



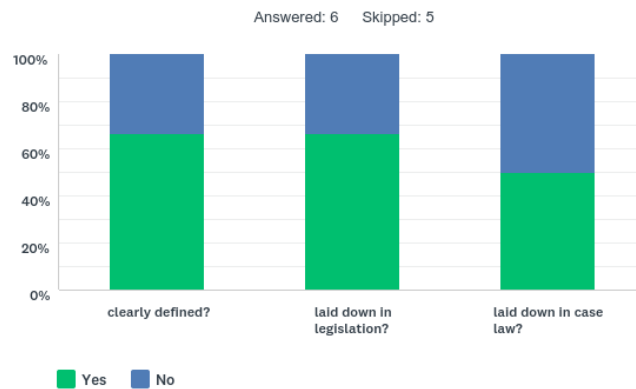
The participants identified several specific difficulties with the current regime. These focussed around the **speed and efficiency of proceedings** as well as difficulties in the **certification and admissibility stage**. ADICAE in particular was very critical of the process. Firstly, the procedure often faces significant delays and consumer cases typically take up to 7 years to reach a first instance judgment, without accounting for appeals. Such delays stem in part from the fact that many Spanish courts do not have the resources or experience to deal with complex, multi-party cases leading to difficulties setting court dates and taking other procedural steps. There are further complications with the process for admitting the claim and certifying the group, particularly in compensatory claims regarding the preliminary investigation to identify the aggrieved parties.

These concerns were shared by defendants as well as claimants. One defendant lawyer gave the example of a collective compensatory claim against a bank following on from an injunctive action. The defendant bank sought to challenge the validity of the group on the basis that there was not sufficient commonality between the claims of the individual group members. In order to achieve this, it was necessary to place evidence before the court at the merits stage disputing the claim of each individual member, placing a huge administrative burden on the defendant and causing significant delay to the proceedings.

Regarding **injunctive** claims the procedure appeared from the survey to be more straightforward. In part this may be down to the fact that there is no need to certify and quantify the group claims when applying for a prohibitive injunction. Nevertheless, some claimant focussed respondents stated that when seeking an injunction the court would often operate on the presumption that contractual terms are valid, leaving the claimant with a heavy burden of proving its case.

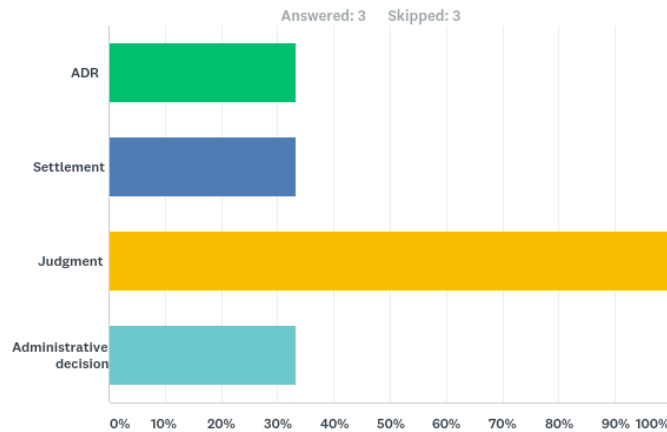
**Sixty five per cent of those who responded to the question considered the conditions for bringing collective redress clearly defined and set out in legislation.** Only 50% considered the law to be well set out in case law although, the participants noted the recent clarifications that have been made by the courts in respect of the opt-out/opt-in mechanisms of collective redress.

**Q19 Are conditions for standing to bring representative actions**



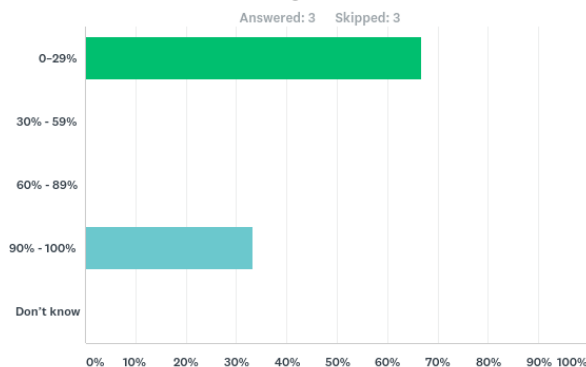
Whilst **Alternate Dispute Resolution** is used in collective proceedings in Spain it is not common. Only 30% of those surveyed had been involved in ADR/collective settlement whilst all of those who had been involved in collective proceedings had experience of a case reaching judgment.

**Q14 What types of collective action mechanism have you had experience of?**



Further, for the majority of respondents only a small proportion of their cases settled prior to final judgment.

**Q15 What percentage of collective actions with which you were involved were resolved by settlement?**



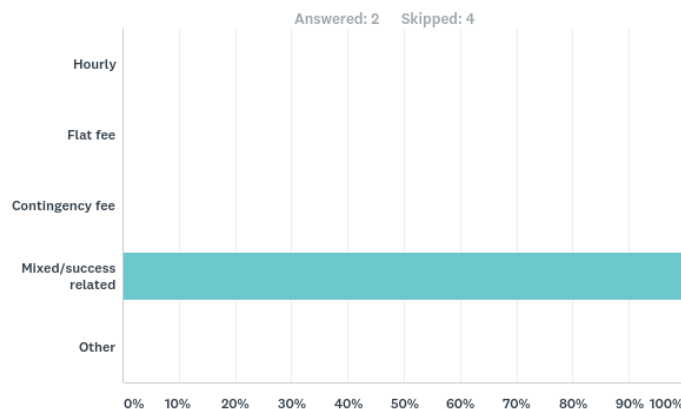
The overall experience of the participants with regard to settlements was that once a claim had begun it was very likely that it would continue all the way through to trial and eventual judgment. One defendant lawyer identified a significant pressure on claimant organisations to continue with claims rather than settle them. He described this as happening in cases where there was a significant public interest in the litigation and a desire on behalf of the public and/or the media to see a judgment rendered against the defendant as a type of sanction. There have been a number of prominent cases against banks in Spain concerning the use of unfavourable terms which have affected large proportions of the population as a whole. It is important to note that there was no such pressure specifically identified by consumer organisations themselves, although, they too considered that the norm was for disputes to continue all the way to judgment.

Another respondent had had extensive experience of an ADR mechanism specifically established with the aim of avoiding compensatory collective proceedings. The defendant bank concerned set up its own scheme in which affected individuals could apply for compensation, each claim was individually determined by an appointed panel and compensation was awarded in more than 90% of cases. The procedure was much cheaper for the bank and applicants received a higher rate of compensation than they most likely would have if the matter had been resolved by judgment. The experience for both sides was very positive and compared favourably with the same bank's experiences in other collective proceedings. The bank avoided the costs of litigating and the claimants received

**Lawyers' fees** are usually paid for via a success fee agreement between the consumer organisation and the lawyer. Defendants' costs are usually paid for on an hourly fixed rate.

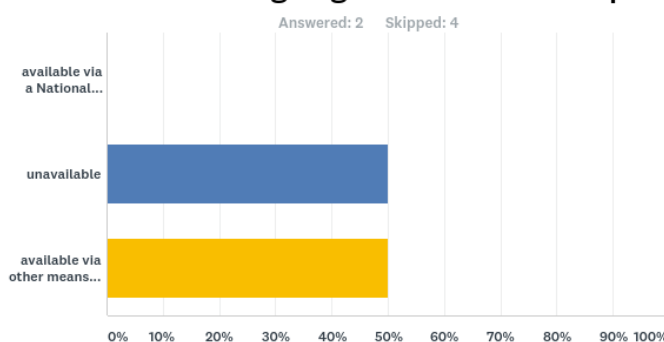
The loser pays principle applies in collective proceedings and thus the unsuccessful party will pay the costs of the successful party. However, the respondents agreed that the costs expended are never fully recovered and as such the recoverability of costs is not something that has a significant impact on a party's decision to commence a collective action. There was therefore no clear consensus between the respondents as to whether the rules on costs are an incentive to utilise collective procedures.

**Q36 How are lawyers' fees paid in collective actions?**



Little **information** on collective redress is available in Spain, either in terms of the existence or availability of collective action or in respect of ongoing proceedings. All respondents stated that information was either unavailable or insufficient. There is no court registry and the only information on current cases is through the consumer associations, who may well be claimants. One participant commented that he was unable to find any statistics or other information regarding collective redress in the Judiciary Office Annual report.

### Q56 Information about ongoing collective redress proceedings is



Those respondents who answered the question did not consider that consumers were sufficiently well informed about collective redress

Those legal practitioners who responded to the question including, notably, a judge considered that collective procedures took longer to dispose of than traditional, non-collective, litigation. However, those same respondents were neutral as to the additional administrative burden imposed on the courts by collective procedures.

In light of the above difficulties identified by the respondents, they generally looked upon the collective redress mechanisms unfavourably. Overall, 80% of participants who responded did not consider collective proceedings to be an effective method of obtaining compensation, while 20% did. Furthermore, 80% of the same participants did not feel that access to justice was enhanced by collective proceedings as opposed to regular proceedings.

Collective redress is well established in Spain and is an area in which there has been some interest in recent years. Of particular note are the large collective actions which have been brought against banks and financial institutions in the wake of the economic crisis in Spain. Whilst the code of civil procedure contains some core rules governing group actions, in general the rules relating to collective redress are contained in a wide variety of different, unconnected pieces of legislation. This stems from the lack of a general system of collective redress and its piecemeal, sectoral development.

The survey identified several issues arising from this lack of a single, coherent regime for collective redress and the lack of clear rules on the procedural steps of group actions. For example, the lack of formal rules on certification or a formal certification stage leads to issues, such as the commonality of claims, which go to the validity of the proceedings themselves being dealt with at the merits stage. Of the current system's incompatibilities with the Recommendation, it is therefore the lack of an early determination of admissibility which is the most significant. However, just as significant is the experience of the courts with dealing collective claims and the lack of ability to deal with the procedure quickly and efficiently.

Overall the study showed that the current compensatory collective redress regime was not viewed favourably either by claimants or defendants who found that there were too many difficulties and legal obstacles to make it an efficient system. However, their views were a long way from consistent. Despite a significant number stating that they did not consider collective proceedings to be an efficient way of obtaining redress, there were others who considered that they were the only realistic method of pursuing claims against banks.

In this regard, a distinction should be drawn between collective claims for compensation and those for injunctive relief. The majority of the difficulties expressed by the participants focussed on compensatory claims and a number of the most prominent group actions in Spain worked well at the stage of obtaining an injunction but ran into difficulties once a follow-on action for compensation was brought. This may be why, in serious mass harm situations ADR is being looked upon more favourably as an alternative, either established by legislation or by the defendants themselves. Once an injunction, and a prima facie declaration of liability has been obtained there is more impetus on both parties to settle the compensatory issues. A recent example is the recently established settlement scheme for victims of fraud clauses under Royal Decree-law 1/2017.

# SWEDEN

## I. Overview

Sweden has both general and sector specific regimes for collective redress. Collective proceedings in all types of civil claims may be brought under the Group Proceedings Act ('GRL'). In addition, specific collective redress regimes have been established in the fields of consumer and competition law. A claimant may obtain both compensatory and injunctive relief under the general procedure for group claims.

### *General*

#### **Collective proceedings may be brought by:**

1. An individual member of the affected group, which can be either a natural or legal person.
2. An association of consumers as part of an organisational group action.
3. A public authority designated by the Government as competent to bring collective proceedings on behalf of the public in certain fields. For example, the designated public authority in consumer disputes is the Consumer Ombudsman.

Following an application by a prospective claimant the court will consider a strict set of criteria in determining whether the claim should be admitted and allowed to continue as a group action. In particular, the court will consider the commonality of the claims between members, whether the group is suitably identifiable and well defined, and whether there is a clear advantage in bringing a group claim rather than the group members bringing, separate individual actions.

Sweden follows the **opt-in** model for general collective actions. The claimant is required to identify the group members in its application to commence the group action. Once the proceedings are admitted and instituted the court will notify all the group members who have been listed and specify a time period for responding. Those members who wish to participate in the proceedings must opt-in via communication to the court. Those who do not respond within the set period are taken as having opted out.

Claimants are generally expected to have some source of external **funding**, either from the group members themselves, insurers or through a fee agreement with their lawyers. The latter can only be of limited assistance since **lawyers are not permitted to fund the entire case themselves upfront**, they can however, enter into a risk agreement with the claimant whereby the rate of their fees will depend on the success of the claim. Third party funding is permitted although it is rarely used in practice and is not regulated either by the court or legislation. Since representative claimants are required to be non-profit there is no incentive for third parties to fund a case.

### *Consumer*

The National Board for Consumer Disputes ('ARN') is a public body which provides a formal ADR mechanism for the settlement of consumer disputes out of court. Section 9 of the Standing Instructions of the board provide that the board may consider disputes where there are several consumers who have a claim against a trader on substantially similar grounds, in a field which

may be considered by the Board, and there is a public interest in the settlement of the dispute. Typically, proceedings in the ARN are instituted by the Consumer Ombudsman, however, a group of consumers may commence a claim where the Ombudsman has declined to act.

The board itself consists of equal numbers of both consumer and trade representatives. Following the consideration of written observations, it will make a recommendation as to how the dispute should be settled. Whilst this recommendation is not binding on the parties it is usually complied with. Where the defendant rejects the recommendation the Consumer Ombudsman may take the decision to pursue the claim through the civil courts under the GRL.

## II. Data

Information on collective redress in Sweden was gathered from representatives of the National Consumer Organisation. They had had experience with both ADR and litigation having conducted one public group action.

They identified **several key problems** with the current Swedish Group Proceedings Act. In particular, they criticised the **length of collective proceedings**, specifically the length of time taken in certification and preliminary hearings. In one major case involving energy suppliers the whole process took approximately ten years from the beginning of ADR proceedings through to judgment, with two years being spent on certification of the group. This delay caused difficulties in engaging the affected individuals and encouraging them to participate in the claim.

The collective mechanism functions on an **opt-in** basis and this was identified as being a **major source of delay**. Significant time was spent by the court on identifying the members of the group and approaching them regarding the action. The procedure was further complicated by persons participating who had no interest in the proceedings. They found that the defendant was adept at using the complexities of the collective procedure against the claimant, for example by challenging the commonality of the group members' claims and therefore the legitimacy of the group. Those who were interviewed described the experience as similar to dealing with 2000 individual claims simultaneously.

In the view of the respondents, **funding** is usually provided by the group representative or the group itself whilst third party funding is either not used or not available. On the other hand, risk agreements with attorneys are utilised although not widely, when they are it is likely to be by advocates who have a small specialisation in group claims.

As to the result in their case, they did not consider that the consumers had been adequately compensated, especially considering the time and effort expended during the proceedings. Nevertheless, consumers were much better off pursuing their claims through the collective mechanism rather than individual actions. In the same case, a small group of consumers commenced individual actions against the energy supplier outside of the group proceedings, all of which were unsuccessful. They simply did not have the resources to succeed against the much better equipped defendant.

In comparison to the group claim, the respondent's experiences of ADR were that it was much more straightforward. Although they felt the success of ADR was very dependent on the circumstances of the case and on having claimants who were willing to engage with the process. However, there were more difficulties when it came to collecting the settlement monies from the defendant.

The use of collective redress in Sweden is limited and there have been very few compensatory actions on which to comment. The key issues raised in the study related, in particular, to the speed and efficiency of proceedings. In the view of the respondents the system would be enhanced by moving to an opt-out system or at least making such an option available.



# UNITED KINGDOM

## I. Overview

The United Kingdom has both general and sector specific collective redress mechanisms. Group Litigation Orders (GLO) and representative proceedings can be used in all types of claims. In addition, there are also sector specific regimes available in Competition and Consumer law.

### *General*

GLOs can be used in all types of claims and allow the court to group and hear together cases which raise one or more common issues. A group register is created (which is available for inspection on request) on which details of the issues in the GLO and the cases which are being managed together under the GLO are entered. The court responsible for the register – the managing court – may also order that all cases commenced in England and Wales which include one or more of the common issues be entered on the register so that the decision on the relevant common issue will also bind the parties to that new claim.

There is no formal requirement for **standing** under the general collective redress mechanisms, it is enough that the claimants have normal legal capacity. However, under CPR 19.6 a representative claimant is required to have the 'same interest' in the claim as those represented. Ultimately, whether or not a party may act as a representative is at the discretion of the court.

### *Competition*

For claims against competition law infringements in the Competition Appeal Tribunal ('CAT'), the recently introduced (October 2015) collective proceedings order allows injunctive and compensatory collective redress – **both on an 'opt-in' and on an 'opt-out' basis** at the discretion of the Tribunal.

Under the competition mechanism the class representative may be either a member of the class or a third party authorised to act by the court. In all cases, in order to have **standing** the applicant must demonstrate to the CAT that it is 'just and reasonable' for it to act as the class representative.

### *Consumer*

In the consumer field, designated public enforcers have been able to apply for injunctive relief against traders who are in breach of consumer laws and since October 2015 have also been able to require compensation to be paid to affected consumers or to consumer benefit organizations.

Those who have **standing** to bring a collective claim include designated public authorities (for example the Office of Fair Trading) and private bodies authorized by the Secretary of State. Individual consumers cannot bring a claim.

Collective proceedings are typically **funded** by a third party, either a specialist litigation funder or the claimants' lawyers under a conditional fee agreement. At present, there is no legislative control of third party funding and parties are not required to disclose their source of funding at the outset of proceedings. However, lawyers entering into conditional fee agreements

with clients are required to carefully explain the agreement to them and all such agreements must be entered into in writing. Damages based agreements, however, are unenforceable in opt-out collective proceedings.

The **costs** of the case are met by the losing party. However, the amount of these costs is subject to the review of the court and may be reduced where, for example, the winner was only partly successful or where an offer to settle was unreasonably rejected. Under a GLO costs are divided into 'common costs' and 'individual costs', a member of a losing group will be liable for the individual costs of their case together with a share of the common costs of the group.

There are at present no proposals for legislative change in this area in England and Wales. The Scottish government has recently (2 June 2017) introduced a Bill into the Scottish parliament to create an equivalent in Scotland of the English GLO procedure.

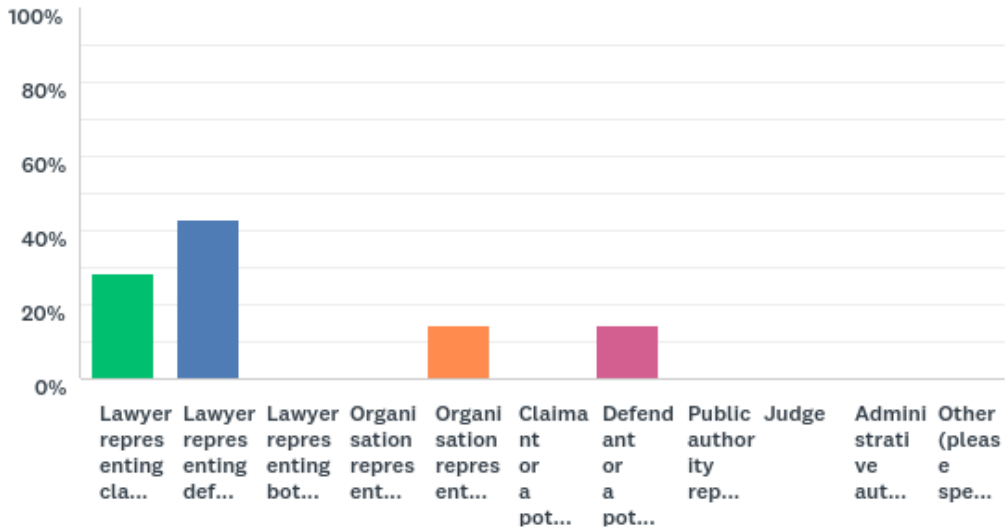
## **II. Data**

The majority of those surveyed were lawyers covering a broad range of practice areas, with a particular focus on financial services and competition litigation (Q3, below). There was a mix of experience in both bringing and defending claims, 42% of those surveyed had been involved in a collective action representing a claimant and 57% representing a defendant. The participants in the study generally gave their comments in respect of the new mechanisms for representative group proceedings established under consumer and competition law and did not comment on their experiences of GLOs or other representative proceedings.

All the respondents had been involved in at least one group action of some type. One respondent, a trade body, had not had any direct experience of collective actions since any claims would be brought against their members directly rather than against the body itself.

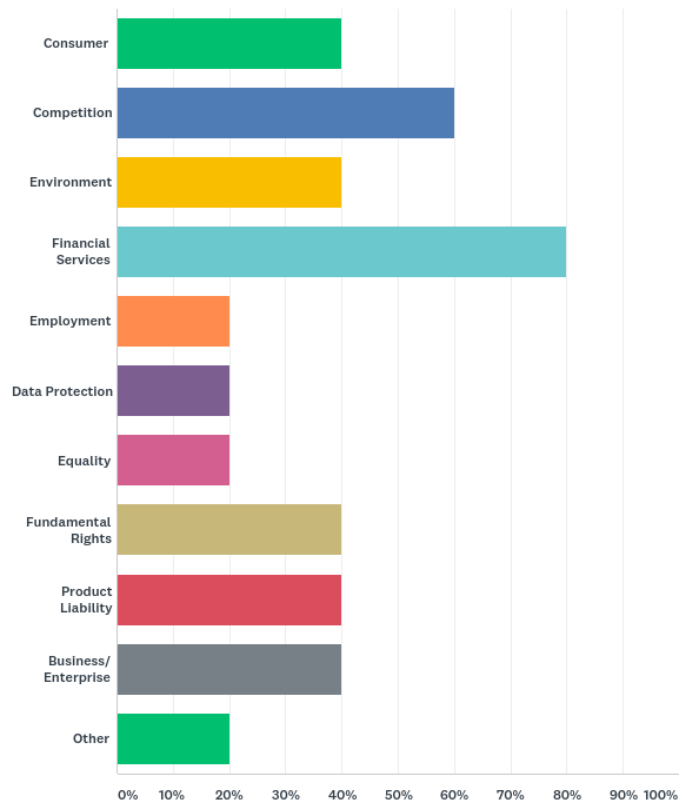
## Q2 Are you a:

Answered: 7 Skipped: 0



## Q3 Please select your field of expertise

Answered: 5 Skipped: 2



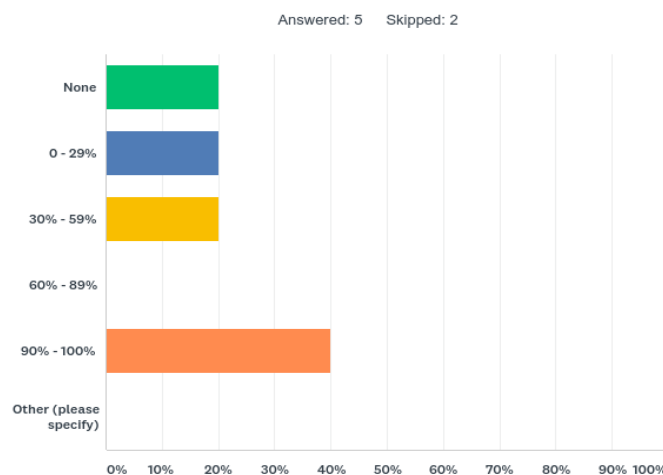
Collective proceedings in the United Kingdom frequently have an **international element**: 40% of the practitioners interviewed stated that in over 90% of their cases there was a cross border element of some type

(Q28 below). Most often this relates to the underlying conduct of the parties but respondents had had experience of overseas claimants bringing follow on actions and cases with a foreign applicable law. The respondents identified some specific difficulties with the conduct of cross boarder collective actions. These included the extra effort and additional costs entailed in identifying class members who may not be resident in the jurisdiction as well as the risk of inconsistent judgments arising out of parallel proceedings. One respondent gave an example of the latter of claims by direct and indirect purchasers in different jurisdictions, and felt more legislation was needed on specific cross boarder issues since, in his opinion, the Brussels Recast Regulation did not provide sufficient certainty in collective cases where the subject matter of the different proceedings was not the same.

One participant did raise the concern of group actions being brought in England which had no connection with the jurisdiction whatsoever. Whilst this is common in commercial litigation in the English courts, the survey did not provide any evidence that this has become a trend with collective proceedings.

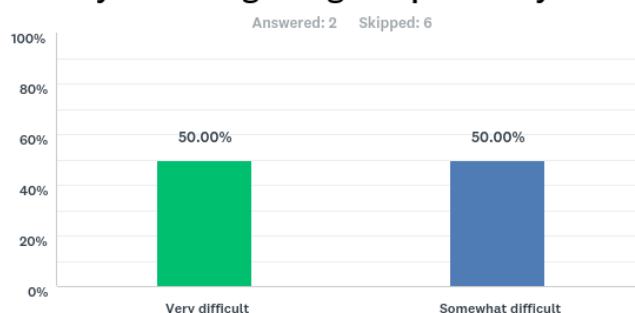
Despite their concerns, half of the respondents stated that they did not find cross boarder collective redress posed any difficulties at all and only one respondent stated that they found cross boarder collective redress 'somewhat difficult'.

Q28 What percentage of collective actions with which you were involved had an EU cross-border element?



All the claimant focussed respondents stated that they had found it difficult to obtain compensation through collective procedures. One claimant focussed lawyer stated that there were difficulties in managing the opt – in process and securing funding for this stage of the proceedings.

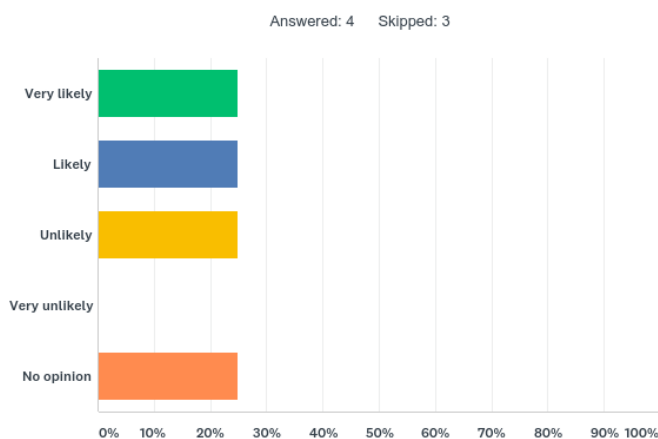
## Q12 How difficult have you found gaining compensatory redress in mass claims?



The participants cited the **lower costs of litigation and greater procedural efficiency** as the main factors influencing their choice of a collective action in order to obtain compensation.

The general view of the UK's approach to third party **funding** was favourable and respondents rated the availability of such funding a key factor in their decision to participate in collective proceedings. The experience of third party funding of collective claims in practice was, overall, a positive one. None of the respondents had any experience of an organisation attempting to fund a claim against a competitor. None of the respondents had had an experience where a funder had overtly attempted to control the litigation although one lawyer described a situation where a funder had withdrawn funding part way through the claim leading to a premature settlement of the case.

## Q43 How likely are you to bring collective actions in light of your jurisdiction's rules on third party funding?



Nevertheless, some of the respondents did feel more could be done on **funding**. Concerns were raised by a senior member of the Competition Appeal Tribunal that more claims would not be brought unless funding was more generally and easily available. A potential solution suggested was that the restriction on damages based agreements in CPOs could be revisited. This issue was echoed by a head of competition law at a major law firm who noted that it was very hard to get funders on board, especially in consumer cases and in order to mitigate their risks they demand a large percentage of the eventual recovery.

On the other hand, one of the participants in the study who had experience of being a defendant in group claims had concerns about the effects of

unregulated access to third party funding, suggesting that this could incentivise funders and law firms to pursue claims which are weak on the merits and/or abusive in order to make a profit. The concerns were not limited to defendants, a different, claimant focussed, participant raised the issue that where funders demand a high percentage of the eventual damages the claimants risk being left significantly undercompensated for their loss

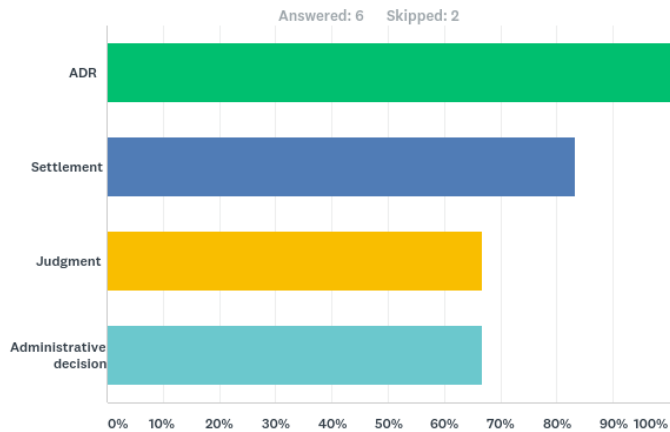
The study showed that group claims in the UK are largely dependent on third parties for funding, therefore, ensuring access to justice for potential claimants also means ensuring that these sources continue to be available. The challenge is to, at the same time, regulate appropriately to protect both defendants and claimants and prevent abuse of process. Several respondents acknowledged that this will likely require more active court involvement in the regulation of funders and funding. The UK has experimented with self-regulation in the past but this was described as 'not in practice very effective.'

Whilst **information** regarding ongoing cases is available, most thought that in the absence of a national registry the position could be improved. Competition law practitioners principally used the Competition Appeal Tribunal website to obtain information on ongoing claims, however, those in other fields had to rely on their own research. 83% of respondents felt that the information provided on the availability of collective redress and the collective redress process in the UK was sufficient, those that did not were claimant focused practitioners. In terms of the claimant organisations themselves, one respondent commented that they would occasionally set up a website dedicated to providing information on an ongoing claim.

The use of **Alternative Dispute Resolution (ADR)** is common in collective proceedings in the UK, all of the participants who had been involved in collective proceedings also had experience of ADR. Those practicing in the financial sector commented that defendants were often required to carry out proactive redress under Financial Conduct Authority rules. One of the lawyers who participated in the survey was of the view that low value consumer claims were not the best use of the courts' time and such claims where the costs of distributing the compensation outweigh the losses may be better resolved by ADR.

**The costs of the case are, in most cases, met by the losing party,** although the court retains overall discretion over who pays and the amount of costs awarded. Overall, the respondents thought that this was a stimulator rather than a deterrent to bringing collective claims, noting however, that an adverse costs order was a significant risk in any litigation, including collective actions. One respondent commented that bringing a collective rather than individual actions could be a mechanism of individual claimants spreading such risk and therefore act as an incentive for collective litigation. Of course this is not applicable where funders are involved and the substantial legal costs in bringing collective actions are another factor in funders demanding a high percentage of successful claims.

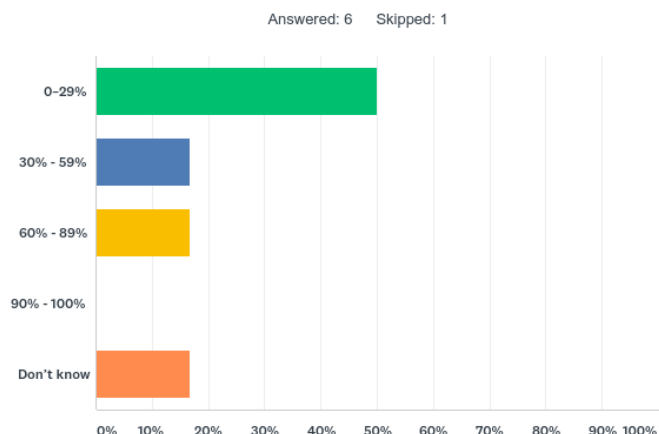
**Q14 What types of collective action mechanism have you had experience of?**



On the other hand, despite the apparent widespread use of out of court settlement the majority of practitioners reported that only a **small number of their litigated cases were resolved prior to judgment** (Q15, below). This indicates that whilst parties may frequently engage in settlement discussions they are rarely successful in collective cases. Cases brought under the new consumer and competition regimes are, in general, at a very early stage and may not yet have reached the point where settlement is a realistic possibility. This was the position in the larger cases some of the participants in the survey were acting in at the time of writing. These figures cannot therefore be taken as an accurate representation covering the entire picture of collective redress in the UK.

All those who had concluded a case by settlement considered that the rights of the parties had been adequately protected. Although, again most cases the respondents were commenting on had not reached a point where they could realistically be settled.

**Q15 What percentage of collective actions with which you were involved were resolved by settlement?**



Three-quarters of those surveyed felt that there were risks of **abusive litigation** within the current regime, however, these did not stretch beyond general concerns and the majority of respondents did not have any

experience of and could not identify any specific instances of abusive litigation. As outlined above, one participant had concerns about easy access to funding on a no win no fee basis leading to an increase in abuse of process, citing the experience of the US and Australian systems.

One respondent pointed to the certification process as significantly reducing the risk of abusive litigation. Despite these concerns, all felt that access to justice was enhanced by collective redress and that collective actions ensured fairness of proceedings.

All the participants who answered considered that collective proceedings in the UK were an effective method of obtaining compensation and that the mechanisms ensure fairness of the proceedings.

Regarding the **opt-out mechanism**, which the UK permits in cases brought under the CPO regime, amongst the participants there was an indication that whilst this had implications for access to justice it simplified the process for enforcement. However, given that at the time of writing there were only 2 cases under the CPO regime in progress in the UK this information is based on little practical experience and it is perhaps too early to assess the merits of the opt-out mechanism. In fact, the majority of respondents declined to answer this question on the basis that they had insufficient experience of the opt-out procedure.

As to the **length of proceedings**, 75% of the respondents were neutral as to whether the collective procedures increased or decreased the length of time to dispose of an action as compared to comparable non-collective action. One respondent commented that it was inevitable that a collective action would last longer due to the insertion of an additional standing/certification stage in the proceedings. At present no cases have proceeded beyond the certification stage and therefore it is impossible to have a definite view.

The **overall impression** from the data collected was that, as a relatively new system in the UK, collective redress needs time to establish and develop. Clearly the newer collective redress mechanisms available in consumer and competition law have not been widely used to date. In fact, as of the time of writing there are no cases brought under the Consumer Rights Act which have proceeded beyond the certification stage.

None of those surveyed pointed to any specific changes that they felt should be made to the legislation and preferred to adopt a 'wait and see' approach. Instead, the majority of concerns, at least from the lawyers' point of view, focussed around issues such as **funding and cross border** claims. It is clear from the results of the study that the approach the UK takes to funding will have a significant influence over the success of collective redress.



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<b>AUSTRIA</b>				
<b>Scope</b>	<b>Standing</b> (Para. 4-7)	<b>Admissibility</b> (Para. 8-9)	<b>Information on Collective Redress</b> (Para. 10-12, 35-37)	<b>Funding</b> (Para. 14-16)
<p>No horizontal collective redress mechanism</p> <p>'Austrian model of group litigation': combination of joinder of claims and litigation finance. The procedure is almost exclusively available for monetary damages.</p> <p>Traditional devices of multi-party procedures are available: joinder, consolidation of cases, test cases and the appointment of a curator.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Lack of a formal collective redress mechanism.</p> <p>The 'Austrian model of group litigation' is suited</p>	<p>No special provisions on standing.</p> <p>In practice, only Consumer Associations (<i>Verein für Konsumenteninformation</i>) and the Employees' Chamber (<i>Arbeiterkammer</i>) bring forth actions under the 'Austrian model of group litigation'. However, any other associations would be entitled to do so as well.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No specific provisions or restrictions as to standing. The Recommendation's restrictions (non-profit making character, direct relationship between the main objectives of the</p>	<p>Early determination of admissibility questions.</p> <p>The court will examine if the claims are based on substantially the same cause of action and concern substantially similar questions of law and fact.</p>	<p>Associations assisting claimants under the 'Austrian model of class action' regularly publish information on currently pending mass litigations (e.g. on their homepage, via newspapers, etc.)</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Due to the lack of a formalized collective redress mechanism in Austria, there is currently neither an official channel for the distribution of information on collective redress nor a national registry.</p>	<p>Commercial litigation finance is used quite often in the 'Austrian model of group litigation'.</p> <p>Since litigation-funding agreements are not normally divulged, no exact figures as to the frequency of the use of litigation finance are available.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Third party funding is not prohibited but unregulated.</p> <p>There is currently also no judicial control of litigation funding or a control of undue influence of funders.</p>

<p>to solve some of the problems arising from traditional multi-party practice, but not all of them.</p>	<p>entity and the rights granted under Union law, sufficient capacities) are, therefore, currently not met.</p>			
<p><b>Cross Border Cases</b> (Para. 17-18)</p> <p>The procedure is not restricted to Austrian claimants. Foreign claimants are free to participate. There are no specific procedural rules if this mechanism is used in cross-border cases.</p>	<p><b>Expedient procedures for injunctive orders</b> (Para. 19)</p> <p>As far as it is necessary to secure the assigned claim, injunctions according to general rules may be issued.</p>	<p><b>Efficient enforcement of injunctive orders</b> (Para. 20)</p> <p>No specific rules regarding enforcement of collective actions and settlements. They are subject to ordinary enforcement via execution proceedings.</p>	<p><b>Opt In/Opt Out</b> (Para. 21-24)</p> <p>Austrian civil procedure strictly follows the opt-in approach. The same applies to the 'Austrian model of group litigation'.</p>	<p><b>Collective ADR and Settlements</b> (Para. 25-28)</p> <p>Court-directed settlements may be concluded during proceedings, in special cases (proceedings at district court level) even before an action is brought.</p> <p>In the preparatory hearing, the judge is under a duty (§ 258 para 1 number 4 Code of Civil Procedure) to suggest a court-directed settlement. Both court-directed and out of court settlements are, in general, subject to some degree of judicial control.</p> <p><b><u>Problems/Incompatibilities with Recommendation principles</u></b></p>

				No specific rules for collective redress as there is no horizontal CR mechanism.
<p><b>Costs</b> (Para. 13)</p> <p>Austria applies the "loser pays" principle. There are, however, some exceptions to this general rule, usually applying when the winning party has culpably caused the occurrence of costs that would have not been necessary.</p>	<p><b>Lawyers' Fees</b> (Para. 29-30)</p> <p>Lawyers' fees are usually either calculated based on the statutorily provided attorney rates or by individual agreement (usually fixed hourly rates).</p> <p>Contingency fees agreed upon between claimants and their attorneys are invalid. However, performance-based fees are possible. It is, for example, possible to agree upon a certain fixed sum payable in case of successful litigation, if there is also a fixed sum stipulated in case of unsuccessful litigation and the two sums are not grossly disproportionate.</p>	<p><b>Prohibition of punitive damages</b> (Para. 31)</p> <p>Punitive/extra-compensatory damages are not available.</p>	<p><b>Collective Follow- on actions</b> (Para 33-34)</p> <p>n/a</p>	<p><b>Interplay between injunctions and compensation across all sectors</b></p> <p>n/a in the absence of a horizontal collective redress mechanism</p> <p>The 'Austrian model of group litigation' procedure is almost exclusively available for monetary damages.</p>

<b>BELGIUM</b>				
<p><b>Scope</b></p> <p>No general collective redress mechanism</p> <p>Collective redress is available for consumer claims.</p> <p>Multiple claims may be joined together under the regular rules of civil procedure.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Limited development of collective redress</p> <p>The law introducing consumer collective actions does not provide for specific rules on injunctive relief</p>	<p><b>Standing</b> (Para. 4-7)</p> <p>Collective redress procedures can only be initiated by a 'group representative'. This may be either:</p> <p>(a) a consumer organization recognized by the Ministry for Economic Affairs.</p> <p>(b) a recognized association with a corporate purpose directed at collective damages</p> <p>(c) Federal Ombudsmen</p>	<p><b>Admissibility</b> (Para. 8-9)</p> <p>The claim's admissibility is decided at the first stage of proceedings and in principle within 2 months of the filing of the claim.</p> <p>A collective action will only be declared admissible when it can be shown that collective proceedings will be more effective than ordinary proceedings.</p>	<p><b>Information on Collective Redress</b> (Para. 10-12, 35-37)</p> <p>Legislation provides that judgments must be published in the Belgian Official Gazette and specified official websites</p> <p>Information on ongoing proceedings is only available through private sources</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No national registry is available</p>	<p><b>Funding</b> (Para. 14-16)</p> <p>Third party funding is not prohibited but it is very rare since group representatives are not entitled to make a profit.</p> <p>Funding is provided by consumer associations through their own funds</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>There is no obligation on the claimant to disclose its source of funding.</p> <p>Third party funding is not regulated.</p>
<p><b>Cross Border Cases</b> (Para. 17-18)</p> <p>Foreign claimants may participate in collective</p>	<p><b>Expedient procedures for injunctive orders</b> (Para. 19)</p> <p>Injunctive orders are</p>	<p><b>Efficient enforcement of injunctive orders</b> (Para. 20)</p> <p>The enforcement of</p>	<p><b>Opt In/Opt Out</b> (Para. 21-24)</p> <p>Availability of both options</p>	<p><b>Collective ADR and Settlements</b> (Para. 25-28)</p> <p>Following the declaration</p>

<p>proceedings on the same terms as domestic claimants, however, they must choose to opt-in to the proceedings.</p>	<p>dealt with by the regular rules of civil procedure, which provide for summary proceedings to be expedited where necessary.</p> <p>Parties can apply on an <i>ex parte</i> basis for interim measures where there are exceptional circumstances or urgency.</p>	<p>Injunctive orders is dealt with under the regular rules of civil procedure.</p> <p>Penalties, including periodic fines, can be imposed by the court for non-compliance</p>	<p>Primarily it is for the parties to decide which system they use. However, where no agreement is reached the court has a wide discretion to decide which procedure to employ in order to best protect the consumers' interests.</p> <p>An opt-in procedure is compulsory where the aim of the proceedings is to obtain damages for physical or moral harm.</p> <p>The opt-in system is limited to domestic claimants.</p>	<p>of admissibility and the time period for opting in or opting out, the court will grant the parties a period of 3 to 6 months in which they are mandated to negotiate.</p> <p>Any settlement requires the approval of the court.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Mandatory negotiation without the consent of the parties.</p>
<p><b>Costs</b> (Para. 13)</p> <p>The 'loser pays' principle applies</p> <p>Costs are set by the law according to the amount at stake in the claim.</p> <p><b><u>Problems/ Incompatibilities with</u></b></p>	<p><b>Lawyers' Fees</b> (Para. 29-30)</p> <p>A reasonable and proportionate success fee can be agreed.</p> <p>However, agreements whereby a lawyer's fees will depend solely on the outcome of the case are</p>	<p><b>Prohibition of punitive damages</b> (Para. 31)</p> <p>Extra-compensatory damages are not available.</p>	<p><b>Collective Follow- on actions</b> (Para 33-34)</p> <p>Collective follow on actions are not available.</p>	<p><b>Interplay between injunctions and compensation across all sectors</b></p> <p>It is possible to apply for both compensation and an injunction in the same proceedings, however, it is more common for an</p>

<p><b><u>Recommendation principles</u></b></p> <p>According to practitioners, the costs of proceedings are among the main factors responsible for the limited number of class actions brought.</p>	<p>prohibited.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Funding arrangements with lawyers are not subject to the approval of the court.</p>			<p>injunction to be obtained at an interim stage.</p>
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**BULGARIA**

<b>Scope</b>	<b>Standing</b> (Para. 4-7)	<b>Admissibility</b> (Para. 8-9)	<b>Information on Collective Redress</b> (Para. 10-12, 35-37)	<b>Funding</b> (Para. 14-16)
<p>Horizontal collective redress mechanism available</p> <p>Injunctive and compensatory</p> <p>Specific consumer mechanisms:</p> <ul style="list-style-type: none"> <li>- collective action for injunctive relief, for the cessation or prohibition of any infringement harmful to collective consumers' interests</li> <li>- collective (group/class) action for damages to the collective consumers' interests</li> <li>- collective action for damages suffered by consumers</li> </ul>	<p><u>Horizontal mechanism:</u> Any harmed persons, or organizations established with a purpose to defend the interests allegedly infringed</p> <p><u>Consumers mechanisms:</u></p> <ul style="list-style-type: none"> <li>- collective action for injunctive relief: registered and qualified consumer protection organisations, and the Commission for Consumer Protection</li> <li>- collective action for damages suffered by consumers: any consumer organisation, provided it has been granted with a power-of-attorney to bring the action on behalf of at least two identified consumers who have suffered damage from the same infringement.</li> </ul>	<p>Early determination of admissibility</p> <p>Article 381 of the Code of Civil Procedure requires that the court hearing the case verifies the admissibility and regularity of the claim</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Practitioners find the admissibility phase excessively formalized: procedural hurdles and time consuming requirements are enforced strictly by Bulgarian courts, in particular during the constitution of the class and in identifying and quantifying harm.</p>	<p>Information on collective redress actions available</p> <p>There are a couple of channels, namely via:</p> <ul style="list-style-type: none"> <li>- announcement on the website of the Commission for Consumer Protection or other organisations for consumer protection;</li> <li>- publications in the press or other information in media;</li> <li>- announcement at the defendant premises</li> </ul> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No national registry</p>	<p>Collective actions are funded by various sources – state budget (the actions brought by the Commission for Consumer Protection), private donations, own financial resources of consumer organisations, and state funding</p> <p>Third party funding is unknown in Bulgaria</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No regulation of third party funding</p>



	ollective action for damages to the collective consumers' interests: any consumer association			
<p><b>Cross Border Cases</b> (Para. 17-18)</p> <p>The horizontal collective redress mechanism can be applied to cross-border disputes. The general procedural rules on parties located abroad will be relevant.</p> <p>An action for collective redress can be brought by a qualified consumer protection organisation from any other member state of the EU, provided that an infringement of collective interests of consumers committed in Bulgaria has effects also on its territory and it is included in the list of qualified organisations prepared by the European Commission published in the Official Journal</p>	<p><b>Expedient procedures for injunctive orders</b> (Para. 19)</p> <p>At the request of the claimant, the court hearing the case may rule on adequate interim measures for the protection of the harmed interests.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>The lack of court chambers specialized in collective redress procedures can be considered as a disadvantage which appears to decrease the efficient case management as some judges are not very familiar with the specifics of this procedure.</p>	<p><b>Efficient enforcement of injunctive orders</b> (Para. 20)</p> <p>If the defendant fails to comply, fines are applicable.</p>	<p><b>Opt In/Opt Out</b> (Para. 21-24)</p> <p>Availability of both options</p> <ul style="list-style-type: none"> <li>- The court hearing the case shall accept as participants in the process other injured parties, organisations for protection of the injured persons, organisations for protection of the injured collective interest, that have requested a participation in the process within the stipulated term (Opt In), and</li> <li>- The court decision is binding for all persons harmed by the same infringement and have not declared that they will bring individual claim for damages (Opt Out)</li> </ul> <p><b><u>Problems/</u></b></p>	<p><b>Collective ADR and Settlements</b> (Para. 25-28)</p> <p>The court is required to direct the parties to a settlement and explain the advantages of voluntary dispute resolution (Article 384 (1) of CCP).</p> <p>The court approves the settlement only if it does not conflict with the law or good morals and if the harmed interest can be sufficiently protected. The settlement takes effect only after it has been approved by the court (Article 384 (2) (3) of CCP).</p>

<p>Despite this provision, Bulgarian legal practice does not seem to have so far experienced any cross-border collective redress.</p>			<p><b><u>Incompatibilities with Recommendation principles</u></b></p> <p>The requirements the parties must meet are prescribed by law but it is up to the judge's discretion to decide if a certain person or organisation is meeting these conditions. This raises concerns about court capability to respond to the complex requirements for collective actions. Courts are not only expected to comply with all formal requirements of the legal procedure, but also to ensure a fair trial for all parties involved.</p>	
<p><b>Costs</b> (Para. 13)</p> <p>The 'loser pays' principle applies.</p> <p>The court may lower the costs if they are excessive considering the actual length and factual complexity of the case</p>	<p><b>Lawyers' Fees</b> (Para. 29-30)</p> <p>The Bulgarian legal system allows conditional fee arrangements between a lawyer and a client, except for cases involving non-material interest (such as collective action for</p>	<p><b>Prohibition of punitive damages</b> (Para. 31)</p> <p>Punitive damages are not allowed under Bulgarian law</p>	<p><b>Collective Follow- on actions</b> (Para 33-34)</p> <p>It is possible to rely on an injunction decision in the follow-on actions for damages.</p>	<p><b>Interplay between injunctions and compensation across all sectors</b></p> <p>Injunction and compensation can be combined in one single action.</p>

<p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>In general, the costs of collective actions procedures in Bulgaria are high, which seems to be an obstacle for bringing new collective actions, especially by consumer organisations.</p>	<p>injunction)</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Contingency fees are possible and not explicitly regulated</p>			
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<b>CROATIA</b>				
<b>Scope</b>	<b>Standing</b> (Para. 4-7)	<b>Admissibility</b> (Para. 8-9)	<b>Information on Collective Redress</b> (Para. 10-12, 35-37)	<b>Funding</b> (Para. 14-16)
<p>Horizontal mechanism which allows <b>injunctive</b> relief only.</p> <p>Provisions on a general mechanism are applicable only when there is a sectoral mechanism but a certain aspect of proceedings initiated by the sectoral mechanism (under provisions of a lex specialis) are not regulated (currently only consumer and discrimination sectors).</p> <p>Joinder of Parties and Consolidation of ind. proceedings available</p> <p>Sectoral mechanism which provides <b>injunctive</b> relief only.</p> <p>Two types of sectoral collective redress mechanisms.</p>	<p><b><u>Representative bodies</u></b> Consumer: brought by consumer organisations and national authorities (defined list of 4 State Ministries and 2 org.)</p> <p>Discrimination: brought by associations, institutions and/or organisations</p> <p>General: standing determined by legislation or through organisations' prescribed activities.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Conflicts of interest occur with government ministry involvement.</p> <p>Limited entities authorised mean that some authorised organisations bring</p>	<p>Early determination of admissibility questions</p>	<p>Specific channels for information on collective redress actions not available.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No information or national registry</p>	<p>Sources of funding include associations-members' fees and/or public funds (consumer assoc.)</p> <p>Third Party funding not allowed</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No control of Funders No special provisions requiring a claimant party to declare the origin of any funding (e.g. membership fees etc.) at the outset of proceedings.</p>

<p><b>Consumer law</b> (Consumer Protection Act (ZSP)) in 2003 and, <b>Anti-discrimination Act</b> (ZSD) in 2008.</p> <p>There is no out-of-court collective redress mechanism.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Limited development of sectoral mechanisms reduces scope of application of mechanisms. No compensatory collective redress Joinder mechanisms not appropriate as they are aimed at expedient and efficient conduct of proceedings.</p>	<p>claims on behalf of other non-authorized entities based on a fictitious relationship. See Franak case.</p>			
<p><b>Cross Border Cases</b> (Para. 17-18)</p> <p>National rules on admissibility or standing facilitate foreign claimant or foreign representative entity involvement</p>	<p><b>Expedient procedures for injunctive orders</b> (Para. 19)</p> <p>No national legislation requiring courts to treat claims for injunctive orders with all due</p>	<p><b>Efficient enforcement of injunctive orders</b> (Para. 20)</p> <p>Sanctions available for non-compliance with the injunctive order across all areas (Article 116/2</p>	<p><b>Opt In/Opt Out</b> (Para. 21-24)</p> <p>Neither Opt-out nor Opt-In. Representative entity brings claim in own right.</p>	<p><b>Collective ADR and Settlements</b> (Para. 25-28)</p> <p>Parties encouraged to settle disputes consensually or out of court. During the</p>

<p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Very narrow scope of foreign party involvement</p>	<p>expediency in consumer and general mechanism.</p> <p>No special case management expedient procedures for injunctive relief in consumer and general mechanism.</p> <p>Expedient injunctive procedure for anti-discrimination claims.</p> <p>Court and/or other entitled bodies mandated to act expediently when conducting proceedings (Art. 63/3 ZSD)</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Current rules create a restriction on access to justice in injunctive claims.</p> <p>Application of ordinary procedural rules to collective claims create delay and unfairness</p> <p>Practice of decisions being appealed as norm obstructs finality and enforcement</p>	<p>ZZP). Sanctions may take the form of a fixed amount or daily rate: Up to 10 000,00-30 000,00 HRK (approx. 1 500-4 000 EUR) for natural persons and 10 000,00-100.000,00 HRK (1500-15 000 EUR) for legal persons.</p> <p>Sanctions to be outlined as part of the original injunctive order given pursuant to the collective redress proceedings. Applicable to consumer, anti-discrimination and general mechanisms.</p>		<p>proceedings the court informs the parties on the possibility of reaching a settlement and assists them to reach it (Article 321 para 3 ZPP).</p> <p>Courts are not entitled to verify the content of a settlement reached by the parties.</p> <p>Conciliation procedure possible prior to commencement of consumer collective claim. Limitation period suspended if parties choose to proceed with conciliation</p>
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<b>Costs (Para. 13)</b>	<b>Lawyers' Fees (Para. 29-30)</b>	<b>Prohibition of punitive damages (Para. 31)</b>	<b>Collective Follow- on actions (Para 33-34)</b>	<b>Interplay between injunctions and compensation across all sectors</b>
<p>The 'loser pays' principle applies</p> <p>Court Costs are recoverable</p>	<p>Contingency fees not allowed</p> <p>Lawyers' fees do not incentivise unnecessary litigation</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>In practice, it appears the current method of calculating lawyer's fees can disproportionately favour claimant lawyers and their clients.</p>	<p>Punitive damages not available.</p> <p>Skimming off/restitution of profits not available.</p>	<p>No possibility of compensatory collective redress.</p> <p>Limitation or prescription periods for individual follow-on damages actions are suspended during injunction/declaratory procedure in consumer law.</p>	<p>Not possible to seek injunction and compensation in single action</p> <p>Individual damages follow-on actions may rely on injunctive orders gained via general and sectoral mechanisms.</p> <p>Under general mechanism, plaintiff can also bring a restitutorial claim alongside collective injunctive action</p>

<b>CYPRUS</b>				
<b>Scope</b>	<b>Standing</b> (Para. 4-7)	<b>Admissibility</b> (Para. 8-9)	<b>Information on Collective Redress</b> (Para. 10-12, 35-37)	<b>Funding</b> (Para. 14-16)
<p>No horizontal collective redress system</p> <p>Traditional mechanisms of multi-party proceedings are available (joinder of actions)</p> <p>Sectoral collective redress mechanism in consumer law (solely injunctive)</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Limited development of collective redress</p> <p>No compensatory collective redress</p>	<p>The Law confers standing to any "qualified entity", including</p> <ul style="list-style-type: none"> <li>- entities listed in the Commission's list of qualified entities</li> <li>- and Cypriot qualified entities</li> </ul>	<p>No specific rules</p>	<p>Information can be obtained from the Registrars and the court Registries themselves. Peer exchange of information between advocates, facilitated by the Cyprus Bar Association and District Bar Associations, is also a working channel.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No national registry</p> <p>Records are still largely not online and often not digitized. At present, the Cyprus court system is undergoing a large-scale reform, with electronic organization of records and cases.</p>	<p>Claimants may be entitled to legal aid, under the Legal Aid Law 2002.</p> <p>The notion of third-party funding is alien to Cyprus civil practice (due to a lack of mass claims).</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>There is no legal framework or basis for court control of third-party funding.</p>



<b>Cross Border Cases</b> (Para. 17-18)	<b>Expedient procedures for injunctive orders</b> (Para. 19)	<b>Efficient enforcement of injunctive orders</b> (Para. 20)	<b>Opt In/Opt Out</b> (Para. 21-24)	<b>Collective ADR and Settlements</b> (Para. 25-28)
<p>The Law enables Community qualified entities to petition the Court. Requirements:</p> <ul style="list-style-type: none"> <li>- The entity must be included in the list of qualified organisations prepared by the European Commission published in the Official Journal</li> <li>- The Court must be satisfied that the applicant entity's purposes justify the filing of an injunction request.</li> </ul>	<p>The court can order the immediate cessation of a violation through interim measures.</p>	<p>The general framework, which follows the English common law tradition, is applicable: in case of noncompliance, contempt of court and/or monetary fines apply.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Practitioners find difficulties with the injunctive procedure due to the large volume of claims, and the lack of legislation in the area, letting too much room for companies to exert their power.</p>	<p>Not applicable</p> <p>Representative entity brings claim in its own right to request an injunction</p>	<p>Pre-trial, the Law requires the representative entity to ask the infringer to cease the infringement. After 14 days, the qualified entity may apply to the Court for an injunction. This requirement is waived if circumstances dictate the immediate commencement of court proceedings (discretion of the Court).</p> <p>During the procedure, in practice, the judge may encourage the parties to settle, but no legal basis so far.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No appropriate collective ADR mechanism available</p>

<p><b>Costs</b> (Para. 13)</p> <p>The 'loser pays' principle applies.</p>	<p><b>Lawyers' Fees</b> (Para. 29-30)</p> <p>Lawyers' fees may be agreed upon between lawyer and client. If no such agreement exists, the rates in Procedural Rule apply.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>It is possible to have an agreement providing for contingency fees.</p>	<p><b>Prohibition of punitive damages</b> (Para. 31)</p> <p>Punitive or exemplary damages are available but rarely awarded.</p>	<p><b>Collective Follow- on actions</b> (Para 33-34)</p> <p>In an individual damage claim, an injunction in a given case may be relied upon by the aggrieved party.</p>	<p><b>Interplay between injunctions and compensation across all sectors</b></p> <p>It is not possible to ask for both injunction and compensation in the same procedure.</p>
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<b>CZECH REPUBLIC</b>				
<b>Scope</b>	<b>Standing</b> (Para. 4-7)	<b>Admissibility</b> (Para. 8-9)	<b>Information on Collective Redress</b> (Para. 10-12, 35-37)	<b>Funding</b> (Para. 14-16)
<p>General provisions on joinder but no horizontal collective redress mechanism</p> <p>Sectoral representative actions (in particular consumer and competition law)</p> <p>Extended lis pendens and res iudicata effect</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No proper collective redress regime for compensatory claims</p> <p>Reform plans to introduce a horizontal collective redress mechanism which allows for compensatory collective redress</p>	<p>Representative actions:</p> <ul style="list-style-type: none"> <li>- association or professional organisation which has a legitimate interest in protecting consumers, or</li> <li>- qualified listed entities</li> </ul>	<p>Early determination of admissibility questions</p>	<p>Information on collective redress is given by consumer associations.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No National Registry</p>	<p>No special regulation of funding</p>

<p><b>Cross Border Cases</b> (Para. 17-18)</p> <p>None in practice</p>	<p><b>Expedient procedures for injunctive orders</b> (Para. 19)</p> <p>In injunctive proceedings against unfair competitive behaviour or consumer protection, the initiation of proceedings and decision on the merits lead to a wide <i>lis pendens</i> and <i>res iudicata</i> effect. This affects rights of others to initiate judicial proceedings in the same case. These potential claimants are not allowed to actively influence the judicial proceedings.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Limitation of access to justice</p>	<p><b>Efficient enforcement of injunctive orders</b> (Para. 20)</p> <p><i>Erga omnes</i> effect prevents access to justice for individual claimants</p>	<p><b>Opt In/Opt Out</b> (Para. 21-24)</p> <p>Only representative actions</p>	<p><b>Collective ADR and Settlements</b> (Para. 25-28)</p> <p>Parties encouraged to settle disputes consensually or out of court</p>
<p><b>Costs</b> (Para. 13)</p> <p>Loser pays principle applies</p>	<p><b>Lawyers' Fees</b> (Para. 29-30)</p> <p>Contingency fees are permitted.</p>	<p><b>Prohibition of punitive damages</b> (Para. 31)</p> <p>No punitive damages</p>	<p><b>Collective Follow- on actions</b> (Para 33-34)</p> <p>n/a.</p>	<p><b>Interplay between injunctions and compensation across all sectors</b></p>

<p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>In practice, the risk of bearing legal costs is considered too high.</p>	<p>A reasonable contingency fee should generally not exceed 25% of the value of the claim.</p>			<p>n/a. In individual cases involving the same plaintiff and defendant and the same claim, the plaintiff or any other entitled person can rely on an injunction, but this does not automatically guarantee an award of compensation. The advantage would be that in injunction claims the court fees are capped, whereas in compensatory claims fees are proportional to the amount of damages claimed. The disadvantage is that court proceedings typically take a long time.</p>
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<b>DENMARK</b>				
<b>Scope</b>	<b>Standing</b> (Para. 4-7)	<b>Admissibility</b> (Para. 8-9)	<b>Information on Collective Redress</b> (Para. 10-12, 35-37)	<b>Funding</b> (Para. 14-16)
<p>There is a horizontal mechanism which allows <b>injunctive</b> and <b>compensatory</b> relief.</p> <p>Other types of mechanisms include joinder of parties and representative actions (which allow <b>injunctive</b> and <b>compensatory</b> relief)</p>	<p><u>Class Action</u> The representative may be (1) a member of the class (private group action), (2) an association, private institution or other organisation when the action falls within the framework of the organisation's object (organisational group action), or (3) by a designated public authority (public group action).</p> <p><u>Representative action</u> Requirement of legal interest When actions are commenced the court may demand security. Conditions laid down in para. 4 (a)-(c) of the Recommendation are to be satisfied. If any of the conditions are no longer applicable, the</p>	<p><u>Class Action</u> class actions can brought when: (1) there is a common claim (2) there is a venue for all of the claims in Denmark, (3) the court is the venue for one of the claims, (4) the court possesses the requisite expertise to deal with one of the claims, (5) class actions are judged to be the best manner of handling the claims (class action is secondary), (6) the members of the class can be identified and informed of the case in an appropriate manner, and (7) a class representative as per Section 254c of the DAJA can be appointed (see section b). According to</p>	<p><u>Class Action</u> Information is provided in a form specified by the court. That may include that the notification is made in whole or in part via public announcement and the court can require the class representative to carry out the notification. The costs of the notification are paid in the first instance by the class representative.</p> <p>A summary of all pending class actions in Denmark can be viewed on the Danish Court Administration's website at <a href="http://www.domstol.dk">www.domstol.dk</a>.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p>	<p>The group representative may apply for free process for the entire group action to the Department of Civil Affairs Private legal aid covered by insurance companies possible.</p> <p>Third-party funding is not prohibited but does not seem widespread in practice. There is no specific regulation.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Since third-party funding is self-regulated and not (yet) common, it is not clear whether and how the courts ensure compliance with the Recommendation</p>

	representative entity loses their status.	<p>case law, the decisive criteria will often be “similar claims” and “the best manner of handling the claims”.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Deciding on procedural issues, including approval of the class action, size of security and identification of the group, may delay the legal process.</p> <p>The preliminary stage of a class action takes a long time, usually at least two years.</p>	In practice, there are concerns with the currency of the information available, in particular on the internet.	
<p><b>Cross Border Cases</b> (Para. 17-18)</p> <p>No limitation as to the nationality of the group members or group representative</p> <p>The court’s decision in class actions based on the Opt Out model only have binding effect on</p>	<p><b>Expedient procedures for injunctive orders</b> (Para. 19)</p> <p>National legislation not requiring to treat claims for injunctive orders with all due expediency.</p> <p>All civil claims (injunction and damages) are treated according to the</p>	<p><b>Efficient enforcement of injunctive orders</b> (Para. 20)</p> <p>Sanctions for non-compliance with the injunction order possible: Anyone who deliberately violates a prohibition or injunction may be sentenced to a fine or imprisonment for up to 4</p>	<p><b>Opt In/Opt Out</b> (Para. 21-24)</p> <p>Both the Opt In and Opt Out model is available under Danish law. Only a designated public authority (currently only the consumer ombudsman) may bring an Opt Out class action. The court sets a deadline</p>	<p><b>Collective ADR and Settlements</b> (Para. 25-28)</p> <p>Judicial approval is required for any out of court settlement agreement. The court will approve the settlement unless it discriminates against some class members or</p>

<p>class members who could have been sued in Denmark for the claim in question when the case was first brought.</p>	<p>same general rules in the Danish Administration of Justice Act (Third book).</p> <p>Interim measures are possible</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No national legislation requiring treatment of injunctive orders with due expediency.</p>	<p>months, and in connection with this, be ordered to pay compensation. The size of fines is according to case law between 2000 - 3500 EUR (no max sanction).</p> <p>All areas covered.</p>	<p>for the class members to opt-in or out (exceptions for extenuating circumstances)</p> <p><b><u>Justified by the sound administration of justice</u></b></p> <p>Opt-Out is only available if it is clear that the claims cannot be expected to be promoted by individual actions, and it is assumed that a group action with registration will not be an appropriate way of dealing with the claims.</p>	<p>is otherwise patently unfair.</p>
<p><b>Costs</b> (Para. 13)</p> <p>Loser pays principle applies, however the court has a wide discretion as to what is "reasonable"</p>	<p><b>Lawyers' Fees</b> (Para. 29-30)</p> <p>Contingency fees are prohibited</p>	<p><b>Prohibition of punitive damages</b> (Para. 31)</p> <p>Punitive or extra-compensatory damages are prohibited</p>	<p><b>Collective Follow-on actions</b> (Para 33-34)</p> <p>Compensatory collective redress starts only after the final injunction/declaratory decision on a breach of law - Commonly in consumer and competition law.</p> <p>Compensatory collective redress to avoid conflicting with ongoing injunction/declaratory</p>	<p><b>Interplay between injunctions and compensation across all sectors</b></p> <p>It is possible to seek injunction and compensation within one single class action.</p> <p>It is possible to rely on an injunction in a separate follow-on individual or collective damages action, if the parties are the same in</p>



			<p>decision on a breach of law is not always possible.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Not always possible to wait until the decision from the public authority has become final to commence follow-on claim.</p>	both cases
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<b>ESTONIA</b>				
<p><b>Scope</b></p> <p>No specific horizontal collective redress mechanism</p> <p>Traditional mechanisms of multi-party proceedings are available (joinder)</p> <p>In consumer law, possibility to bring a claim on behalf of consumers against unfair trading conditions (solely injunctive)</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Limited class action mechanisms available</p> <p>No compensatory collective redress</p>	<p><b>Standing</b> (Para. 4-7)</p> <p>The Estonian Consumer Protection Agency (<i>Tarbijakaitseamet</i>), on behalf of the state, and consumer organisations in their own name can bring a claim to protect the collective rights of consumers by demanding the non-application of unreasonable and harmful standard conditions in accordance with Directive 98/27/EC.</p> <p>The consumers associations must be designated and meet specific requirements</p>	<p><b>Admissibility</b> (Para. 8-9)</p> <p>There are no specific rules on admissibility</p>	<p><b>Information on Collective Redress</b> (Para. 10-12, 35-37)</p> <p>For consumer claims, the Consumer Protection Agency has various means of providing information on general consumer issues including court cases, mainly through its website</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No national registry on collective redress cases</p>	<p><b>Funding</b> (Para. 14-16)</p> <p>In the absence of collective redress mechanisms, there are no special rules on funding.</p>
<p><b>Cross Border Cases</b> (Para. 17-18)</p> <p>In the absence of a</p>	<p><b>Expedient procedures for injunctive orders</b> (Para. 19)</p>	<p><b>Efficient enforcement of injunctive orders</b> (Para. 20)</p>	<p><b>Opt In/Opt Out</b> (Para. 21-24)</p> <p>In the absence of</p>	<p><b>Collective ADR and Settlements</b> (Para. 25-28)</p>

<p>collective redress mechanism, there are no special rules for cross-border cases.</p>	<p>No special rules</p>	<p>In consumer matters, if the trader does not comply with the injunction issued by the Consumer Protection Board, a penalty payment may be imposed upon him.</p>	<p>collective redress procedures, this is not applicable.</p> <p>As seen in its comments to EU consultations, Estonia does not support the opt-out model, as it is not compatible with many fundamental aspects of the Estonian procedural system.</p>	<p>The Consumer Dispute Committee provides for an alternative dispute resolution mechanism for consumer claims.</p> <p>The Insurance Court of Arbitration provides for an alternative dispute resolution mechanism for insurance claims.</p>
<p><b>Costs</b> (Para. 13)</p> <p>In the absence of collective redress mechanisms there are no special rules on costs.</p>	<p><b>Lawyers' Fees</b> (Para. 29-30)</p> <p>Contingency fees are permitted in Estonia.</p>	<p><b>Prohibition of punitive damages</b> (Para. 31)</p> <p>Estonian law does not allow punitive or exemplary damages.</p>	<p><b>Collective Follow- on actions</b> (Para 33-34)</p> <p>There are no special procedure for damage claims in competition law and no mechanisms for collective claims or actions by representative bodies or public interest litigation (no collective redress).</p>	<p><b>Interplay between injunctions and compensation across all sectors</b></p> <p>No compensatory collective redress</p>

**FINLAND**

<b>Scope</b>	<b>Standing</b> (Para. 4-7)	<b>Admissibility</b> (Para. 8-9)	<b>Information on Collective Redress</b> (Para. 10-12, 35-37)	<b>Funding</b> (Para. 14-16)
<p>No specific horizontal collective redress mechanism</p> <p>Collective redress mechanisms available exclusively in the consumer sector, except in the context of certain financial services within the consumer sector</p> <p>Injunctive and compensatory</p> <p>In the consumer sector, it is also possible to direct a “group complaint” at the Consumer Disputes Board, which is a neutral and independent expert body. Its decisions are only recommendations.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Limited development of</p>	<p>The Consumer Ombudsman (kuluttaja-asiamies) is the designated entity to act as a representative and initiate class actions in the consumer sector.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>The competence to file a class action claim is exclusive to the Consumer Ombudsman. No ad hoc licenses are available for other entities under current law.</p>	<p>When the claim is processed, the competent court evaluates the following requirements:</p> <ul style="list-style-type: none"> <li>- Multiple individuals have similar claims (same or similar legal facts) against a common defendant</li> <li>- The use of class action is appropriate in consideration of the size of the party and the nature of the claims</li> <li>- The claimant party can be specified on a reasonable level</li> </ul> <p>If the court determines that the case may be processed as a class action, the Consumer Ombudsman is notified. He will then assemble the class and present their claims to the court.</p>	<p>Unless the claim is dismissed, the court must notify each member of the party of the start of the class action process. This should be done by mail or email. If this not possible, the notification on the class action may be posted in one or more newspapers or other suitable media.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>As no class actions have been initiated at the time of this report (June 2017), there is no national registry for collective redress actions. However, it is likely that any information on collective redress actions</p>	<p>The Class Action Act does not provide any specific restrictions to the funding of class actions, or provisions on conditions or control of third party funding.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No prohibition or regulation of third party funding. However, as the Consumer Ombudsman acts as a plaintiff in all class action, this has not been seen as a major problem.</p>

collective redress mechanisms			would be published through Finlex, an online database of up-to-date legislative and other judicial information of Finland, owned by Finland's Ministry of Justice.	
<p><b>Cross Border Cases</b> (Para. 17-18)</p> <p>No specific rules or limitations regarding the involvement of foreign claimants or foreign representative entities</p>	<p><b>Expedient procedures for injunctive orders</b> (Para. 19)</p> <p>The court can order the immediate cessation of a violation through interim measures.</p>	<p><b>Efficient enforcement of injunctive orders</b> (Para. 20)</p> <p>General procedures for enforcement apply. Fines are applicable in case of non-compliance.</p>	<p><b>Opt In/Opt Out</b> (Para. 21-24)</p> <p>Opt-in system</p> <p>Any member of the claimant class may leave the class at any time before the final proceeding. After this, leaving the class is only allowed with the defendant's permission.</p>	<p><b>Collective ADR and Settlements</b> (Para. 25-28)</p> <p>The Class Action Act does not contain any specific provisions on court directed settlement during the class action procedure.</p> <p>As the general provisions on civil procedure apply to class actions, general preconditions for settlement are evaluated at the start of the process, and as a plaintiff, the Consumer Ombudsman may accept or negotiate a settlement on behalf of the claimant party at any time. The settlement shall then be affirmed by the ruling court.</p>

				<p>In case of out of court settlements: judicial control by the Consumer Ombudsman</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Lack of specific provisions on collective alternative dispute resolution and settlements.</p>
<p><b>Costs</b> (Para. 13)</p> <p>In general, the losing party is accountable for all the necessary and reasonable legal costs.</p> <p>In class actions, the legal costs are distributed between the Consumer Ombudsman and the defendant as determined by the Judicial Procedure Act.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p>	<p><b>Lawyers' Fees</b> (Para. 29-30)</p> <p>Contingency fees are permitted in Finland. They are however not common, and the final fee must be "reasonable".</p>	<p><b>Prohibition of punitive damages</b> (Para. 31)</p> <p>Punitive damages are not available under Finnish law.</p>	<p><b>Collective Follow- on actions</b> (Para 33-34)</p> <p>In competition law, individual damages actions can be brought as follow-on actions based on the finding of an infringement. The law does not provide the same for collective actions.</p>	<p><b>Interplay between injunctions and compensation across all sectors</b></p> <p>It is possible in theory to seek an injunction and compensation within one single action.</p>

In practice, the costs of the proceedings are a deterrent to bring a collective action, and work as a "catalyst for negotiation".				
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FRANCE				
Scope	Standing (Para. 4-7)	Admissibility (Para. 8-9)	Information on Collective Redress (Para. 10-12, 35-37)	Funding (Para. 14-16)
<p>No specific horizontal collective redress mechanism</p> <p>Sectoral (similar mechanisms): consumer protection, competition, health, discrimination, environment and personal data</p> <p>Available remedies:</p> <ul style="list-style-type: none"> <li>- Compensatory only for consumer, competition and health</li> <li>- Injunctive only for data protection violations</li> <li>- Compensatory and injunctive for discrimination and environment</li> </ul>	<p>In all sectors, associations must be duly registered, with for statutory aim to protect these specific rights</p> <p>Consumer and competition: national representative consumer associations accredited by the government, with at least one year of existence</p> <p>Discrimination: trade unions and associations with five years of existence</p>	<p>The admissibility of the claim is dealt with in the first stage of a collective action.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>In practice, the admissibility phase usually takes at least two years, which contributes to make collective redress a lengthy process.</p> <p>There is a difficulty in the sector of data protection: the identification of a definite damage is a condition of admissibility, whereas the collective redress mechanism is only injunctive, and the harm particularly difficult to quantify.</p>	<p>After a final decision on admissibility, the court decides on the publicity measures to be taken. Costs borne by the defendant.</p> <p>Information about ongoing consumer collective redress proceedings is available on the website of the National Consumer Institute.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No national registry</p> <p>Publicity campaigns undertaken by parties: intensive outreach campaigns launched at the very first stage of the action, creating reputational costs for</p>	<p>The current regime provides for public support of group action proceedings.</p> <p>To date, the associations bringing the claims have been funding the actions. The court can direct the defendant to provide the claimant association(s) with advance payments in respect of costs and expenses arising out of constitution of the group</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>There is no specific provision relating to third party funding.</p>



			<p>companies. In reply, companies develop their own information strategies targeting individuals</p> <p>Lawyer-driven litigation: initiatives to launch web platforms aiming at informing individuals and at collecting complaints against companies (for instance: <a href="http://www.actioncivile.com">www.actioncivile.com</a>)</p>	
<p><b>Cross Border Cases</b> (Para. 17-18)</p> <p>Currently no collective action involves foreign plaintiffs There are no specific rules or limitations as to the participation of foreign claimants</p>	<p><b>Expedient procedures for injunctive orders</b> (Para. 19)</p> <p>Under art. L621-9 of the Consumer Code, the association can intervene and ask the Court to apply, where necessary, injunctive relief: if the Court recognises a violation, it can order interim and conservatory measures</p>	<p><b>Efficient enforcement of injunctive orders</b> (Para. 20)</p> <p>The judge who ruled on liability also decides on difficulties which might arise during the implementation stage of the judgment The association is deemed to be a creditor and can request interim and conservatory measures to compel the defaulting debtor to perform its obligation, if necessary under penalty in the case of non-compliance</p>	<p><b>Opt In/Opt Out</b> (Para. 21-24)</p> <p>Opt-in system</p> <p>Consumer and competition: following the judgement on liability and after the implementation of publicity measures, consumers have up to six months to join the proceedings</p> <p>Health: the time limit for opting in is between six months and five years</p>	<p><b>Collective ADR and Settlements</b> (Para. 25-28)</p> <p>Associations can settle the case on behalf of the claimants Judicial approval is required for any out of court settlement agreement The settlement agreement must specify the publicity process, the dates and the criteria for inclusion in the settlement and the court must verify that the settlement agreement correctly and sufficiently protects the claimants'</p>

				interests
<p><b>Costs</b> (Para. 13)</p> <p>The court may order the losing party to pay the winning party's lawyer's and/or expert's fees (taking into consideration rules of equity and financial condition of the party) Court costs are usually borne by the losing party unless the judge decides otherwise</p>	<p><b>Lawyers' Fees</b> (Para. 29-30)</p> <p>Contingency fees are prohibited Result-based fees are only possible if they remain a complement to hourly-based fees</p>	<p><b>Prohibition of punitive damages</b> (Para. 31)</p> <p>Punitive damages are currently prohibited under French law</p>	<p><b>Collective Follow-on actions</b> (Para 33-34)</p> <p>Competition group actions are exclusively follow-on actions: they are authorised only after a final decision from the National Competition Authority, the European Commission or a court which has identified anticompetitive behaviour. After the final decision is issued, the representative entity has five to bring the claim.</p>	<p><b>Interplay between injunctions and compensation across all sectors</b></p> <p>Compensatory and injunctive reliefs in one single action can only be sought for discrimination and environment violations. In consumer, competition and health law, only compensation can be sought with a group action. However, a cessation of the breach can be obtained through the use of interim measure justified by an imminent harm, or to stop a manifestly illegal act.</p>

<b>GERMANY</b>				
<p><b>Scope</b></p> <p>No horizontal mechanism, but joinder of parties, joinder of claims and stay of proceedings.</p> <p>For high value antitrust damages claims: collection of claims via assignment by single entity that brings the claim. To date formal hurdles to this approach.</p> <p>In consumer law and unfair competition: injunctions or skimming off of profits.</p> <p>For Investor claims: compensatory test case proceedings. Decision on liability has binding effect for plurality of individual claims which are stayed until test case is decided.</p> <p><b><u>Problems/ Incompatibilities with Recommendation</u></b></p>	<p><b>Standing</b> (Para. 4-7)</p> <p><b>Competition and consumer law</b> Consumer or business associations, authorities</p> <p><b>KapMuG</b> Lead plaintiff</p> <p><b>Assignment cases</b> Assignee</p>	<p><b>Admissibility</b> (Para. 8-9)</p> <p>In KapMuG cases, a minimum participation of 10 plaintiffs is required to get test case proceedings started.</p>	<p><b>Information on Collective Redress</b> (Para. 10-12, 35-37)</p> <p>Information on test case proceedings is published to inform potential test case claimants.</p>	<p><b>Funding</b> (Para. 14-16)</p> <p>Third party funding is available depending on specifics of the case.</p> <p>Area remains unregulated as third party funding is a relatively new phenomenon in Germany.</p>

<p><b><u>principles</u></b></p> <p>No coherent horizontal regime</p>				
<p><b>Cross Border Cases</b> (Para. 17-18)</p> <p>In principle foreign claimants can participate both in injunctive proceedings in consumer-competition law and in KapMuG cases.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Standing in cross-border KapMuG proceedings has proven difficult in practice as foreign claimants faced administrative hurdles to prove their legal capacity.</p>	<p><b>Expedient procedures for injunctive orders</b> (Para. 19)</p> <p>Yes</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Lack of financial incentives for associations can hinder use of proceedings</p>	<p><b>Efficient enforcement of injunctive orders</b> (Para. 20)</p> <p>Yes</p>	<p><b>Opt In/Opt Out</b> (Para. 21-24)</p> <p>In KapMuG cases, the approach is similar to opt-in. In addition, opt-out settlements are permitted. As these occur during KapMuG proceedings, the opt-out follows an earlier “opt-in” and does therefore not cause any concerns commonly related with opt-out proceedings.</p>	<p><b>Collective ADR and Settlements</b> (Para. 25-28)</p> <p>Parties are encouraged to settle compensation disputes consensually under KapMuG. Special settlement provisions were introduced in 2012.</p>

<b>Costs (Para. 13)</b>	<b>Lawyers' Fees (Para. 29-30)</b>	<b>Prohibition of punitive damages (Para. 31)</b>	<b>Collective Follow- on actions (Para 33-34)</b>	<b>Interplay between injunctions and compensation across all sectors</b>
<p>The 'loser pays' principle applies.</p>	<p>Success based fees are possible in limited form</p> <p>Lawyers' fees do not incentivise unnecessary litigation.</p>	<p>No punitive damages</p>	<p>No specific framework for follow-on <i>collective</i> claims</p>	<p>Usually the question does not arise, as consumer redress is mostly limited to injunctions and investor claims are declaratory actions followed by individual damages claims. In the latter case the findings in the test case proceedings have binding effect on subsequent individual compensation claims.</p>

GREECE				
<p><b>Scope</b></p> <p>No horizontal mechanism but joinder of parties, consolidation of proceedings available.</p> <p>A sectoral mechanism in consumer law is available and allows both <b>injunctive and limited compensatory</b> relief.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Joinder does not ensure access to justice or fairness as multiple claimants are not treated as a single entity and joined claims remain ind. vis a vis the claimants.</p> <p>Poor transparency of joinder proceedings: Defendant not aware of composition of group of claimants</p>	<p><b>Standing</b> (Para. 4-7)</p> <p><u>Representative Action</u> A representative action may be filed by a consumer association which fulfils specific criteria regarding membership numbers and registration on Consumer Associations Reg.</p> <p>Associations need to satisfy the criteria of points (a) and (b) of para 4 of the Recommendation</p> <p>Status of consumer associations is revoked if associations do not demonstrate any activity for two years or violate certain provisions of the Consumer Act.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p>	<p><b>Admissibility</b> (Para. 8-9)</p> <p>Early determination of admissibility questions</p> <p>Consumer claims brought for protection of consumer interest. General requirement of a legal interest</p>	<p><b>Information on Collective Redress</b> (Para. 10-12, 35-37)</p> <p>Information available on collective redress actions via consumer association websites.</p> <p>National Registry not available</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No registry and information on existing actions</p>	<p><b>Funding</b> (Para. 14-16)</p> <p>In claims brought by consumer associations: registration fees, contributions, income generated, public funds, non-pecuniary damages compensations</p> <p>Private funding not allowed</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Registration fees are too low to generate sufficient funds to support representative action.</p>

	As regards point (c) of para 4 of the Recommendation, there are no requirements in respect to the entities' capacity in terms of financial and human resources, and legal expertise			
<p><b>Cross Border Cases</b> (Para. 17-18)</p> <p>National rules on admissibility or standing facilitate foreign claimant or foreign representative entity involvement</p>	<p><b>Expedient procedures for injunctive orders</b> (Para. 19)</p> <p>Legislation requires courts in consumer representative claims to hear dispute at the 'earliest possible hearing date' (article 10(20) of the Consumer Act).</p>	<p><b>Efficient enforcement of injunctive orders</b> (Para. 20)</p> <p>Art. 10(21) of the Law on Consumer Protection grants Minister of Development the power to issue ministerial order obliging suppliers to adhere to a court decision.</p> <p>Sanctions for non-compliance with injunctive order possible (up to €100,000 for any violation). The injunctive order may also impose detention up to one year against the incompliant supplier. If the aforementioned penalties are not included in the injunctive</p>	<p><b>Opt In/Opt Out</b> (Para. 21-24)</p> <p>Opt-out process. However, need for subsequent individual claims effectively results to functioning as opt-in process.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Opt in unsuitable. Opt-out proceedings, are more apt to overcome both damage-quantification problems and rational apathy on the part of victims.</p>	<p><b>Collective ADR and Settlements</b> (Para. 25-28)</p> <p>No provision for collective alternative dispute resolution but in practice a consumer protection association may attempt to mediate. Proposed solution not binding on parties.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Settlements not examined by the courts. Out of court settlements not common.</p>

		<p>order, application can be made to court of first instance.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Ministerial order can subsequently be amended. No formal-judicial mechanism for monitoring compliance with an injunction order</p>		
<p><b>Costs</b> (Para. 13)</p> <p>The 'loser pays' principle applies.</p>	<p><b>Lawyers' Fees</b> (Para. 29-30)</p> <p>Contingency fees allowed but it is not clear how contingency fees affect the incentive to litigate.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Abusive litigation and/or frivolous litigation can arise due to the way in which lawyers are remunerated on the basis of hourly rates,</p>	<p><b>Prohibition of punitive damages</b> (Para. 31)</p> <p>Non-pecuniary (moral) damages available in representative claims and must be used to further consumer protection purposes. Akin to punitive damages</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Availability of punitive damages</p>	<p><b>Collective Follow- on actions</b> (Para 33-34)</p> <p>Individual actions for damages start after final injunction order in consumer cases. Joinder mechanism used in such cases.</p> <p>Follow-on claims in competition rare due to length of proceedings.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p>	<p><b>Interplay between injunctions and compensation across all sectors</b></p> <p>Collective injunctive and compensatory actions (moral damages) can be brought within single proceedings in consumer cases.</p> <p>Individual consumers can bring subsequent individual claim for damages based on injunctive order.</p>



	which is often the case when the defendant is a corporation. Allowance of contingency fees		Procedure before Competition Commission (HCC) lengthy and subject to short limitation period. No suspension of limitation periods until the HCC reaches its decision.	
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<b>HUNGARY</b>				
<b>Scope</b>	<b>Standing</b> (Para. 4-7)	<b>Admissibility</b> (Para. 8-9)	<b>Information on Collective Redress</b> (Para. 10-12, 35-37)	<b>Funding</b> (Para. 14-16)
<p>No specific horizontal collective redress mechanism</p> <p>Sectoral collective redress mechanisms in specific areas:</p> <ul style="list-style-type: none"> <li>- unfair contract terms in consumer contracts (injunctive)</li> <li>- consumer protection rules (injunctive and compensatory)</li> <li>- competition law (injunctive and compensatory),</li> <li>- banking/financial services (injunctive and compensatory)</li> <li>- environment (injunctive)</li> <li>- employment (injunctive)</li> </ul> <p>The new Code of Civil Procedure, entering into force in January 2018, provides for rules on a sectoral collective redress mechanism</p>	<p>Unfair contract terms in consumer contracts: the public prosecutor; the minister, or the head of any autonomous government authority, government office or central office; the head of the Budapest and county government offices; and professional chambers and organizations; consumer protection organizations established in any Member State of the EEA, the Hungarian National Bank (for banking related cases)</p> <p>Consumer protection rules: the Consumer Protection Authority and consumer protection organizations</p> <p>Competition: Hungarian Competition Authority</p> <p>Banking: Hungarian National Bank and the</p>	<p>The court examines the admissibility of the claim and, where compensation is available (consumer, competition, financial services), if the amount of damages can be clearly defined.</p>	<p>The court will decide on the format of the publication, usually in a newspaper of national significance and online.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No national registry</p> <p>The channels for dissemination of information on collective claims are not effective.</p>	<p>No special rules on funding collective actions.</p> <p>Consumer protection organizations are funded on yearly basis by the Government; these funds can be used for financing collective actions but there is no specific, targeted funding for collective actions.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>There are no legal obstacles for a third party funding but it has not yet been used in practice.</p>

<p>(injunctive and compensatory) for claims arising from consumer contracts, from health damages caused by unforeseeable environmental incidents, and in labour cases.</p>	<p>consumer protection organizations</p> <p>Environment: organizations established for the protection of environment and by the public prosecutor</p> <p>Employment: public prosecutor, the public authority, and relevant non-governmental civil societies.</p>			
<p><b>Cross Border Cases</b> (Para. 17-18)</p> <p>There are no specific restrictions as to the participations of foreign claimants. For consumer claims, standing is given to any consumer protection organization established in the EEA registered with the EU Commission.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>In practice, there are concerns regarding the</p>	<p><b>Expedient procedures for injunctive orders</b> (Para. 19)</p> <p>For consumer claims, the court may order interim measures if necessary to prevent an immediate harm, provided the measure is proportionate.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Collective actions are conducted in an ordinary civil procedure, and summary proceedings</p>	<p><b>Efficient enforcement of injunctive orders</b> (Para. 20)</p> <p>Regular enforcement procedure applies.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>There are no sanctions in place to secure voluntary compliance with the judgment.</p>	<p><b>Opt In/Opt Out</b> (Para. 21-24)</p> <p>Where compensation is available (consumer, competition, financial services), if the amount of the claim can be clearly defined, then the compensatory mechanism follows an opt-in system. Affected consumers can join the claim up until the closure of the hearing preceding the first instance judgment. Otherwise, the court issues a decision on liability, and compensation relies on</p>	<p><b>Collective ADR and Settlements</b> (Para. 25-28)</p> <p>Hungary has two out-of-court ADR schemes specifically designed for the resolution of consumer to business disputes.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>In practice, most of the cases regard unfair contractual terms, and court directed settlements before or</p>

enforcement of decisions in cross border cases.	are not available except in the sector of financial services.		the initiative of each individual consumer.  Regarding injunctive mechanisms in the other sectors, there is no opting in or out: the claim is made in the general public interest.	during the civil procedure are not available in that sector.
<b>Costs</b> (Para. 13)  The 'loser pays' principle applies  Court Costs: consumer protection organizations, the public prosecutor and the Hungarian National Bank are exempted from paying court fees.	<b>Lawyers' Fees</b> (Para. 29-30)  Contingency fees are possible but not common in practice.	<b>Prohibition of punitive damages</b> (Para. 31)  As a matter of general rule, punitive damages are not available.	<b>Collective Follow- on actions</b> (Para 33-34)  In theory it is possible to rely on an injunction for a follow-on collective action, but it has never been done in practice. Following an injunction, affected consumers bring individual compensation claims.	<b>Interplay between injunctions and compensation across all sectors</b>  Where compensation is available (consumer, competition, financial services), injunction and compensation can be combined in one single action only if the group of affected consumers and the amount of their damages is clearly identified.

<b>IRELAND</b>				
<b>Scope</b>	<b>Standing</b> (Para. 4-7)	<b>Admissibility</b> (Para. 8-9)	<b>Information on Collective Redress</b> (Para. 10-12, 35-37)	<b>Funding</b> (Para. 14-16)
<p>No horizontal or sectoral collective redress mechanisms in Ireland</p> <p>A mechanism called Representative Action exists but is very limited in practice, and solely injunctive</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No legal framework which establishes and regulates the use of class-actions or other similar collective redress mechanisms in Ireland, despite the recommendations</p>	<p>For representative actions, the representative must be authorized by the members of the class</p>	<p>No specific rules in the absence of a collective redress mechanism</p>	<p>n/a</p>	<p>The general applicable rules provide that third party funding of litigation is prohibited in Ireland</p> <p>Public funding is not allowed for representative actions</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Because multi-party litigations usually entail heavy financial burden, the lack of possibility to fund it would usually prevent initiation of a representative action.</p>
<b>Cross Border Cases</b> (Para. 17-18)	<b>Expedient procedures for injunctive orders</b> (Para. 19)	<b>Efficient enforcement of injunctive orders</b> (Para. 20)	<b>Opt In/Opt Out</b> (Para. 21-24)	<b>Collective ADR and Settlements</b> (Para. 25-28)
<p>No specific rules in the absence of a collective</p>	<p>No specific rules in the absence of a collective</p>	<p>No specific rules in the absence of a collective</p>	<p>The representative action follows an opt-in system</p>	<p>No specific rules in the absence of a collective</p>

redress mechanism	redress mechanism	redress mechanism		redress mechanism
<p><b>Costs</b> (Para. 13)</p> <p>The 'loser pays' principle applies.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No specific rules in the absence of a collective redress mechanism</p>	<p><b>Lawyers' Fees</b> (Para. 29-30)</p> <p>Contingency fees agreements are permitted.</p>	<p><b>Prohibition of punitive damages</b> (Para. 31)</p> <p>Recovery of punitive damages is rare and limited (usually on public policy grounds)</p>	<p><b>Collective Follow- on actions</b> (Para 33-34)</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No specific rules in the absence of a collective redress mechanism</p>	<p><b>Interplay between injunctions and compensation across all sectors</b></p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No specific rules in the absence of a collective redress mechanism</p>

ITALY				
<p><b>Scope</b></p> <p>There is no general collective redress mechanism</p> <p>Multiple claims may be joined together under the regular rules of civil procedure.</p> <p>Sectoral: Consumer, Competition, Financial Market, Product Liability and Administrative (Actions against public authorities.)</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Cultural resistance of Italian lawyers and judges to promote the <i>azione di classe</i></p>	<p><b>Standing</b> (Para. 4-7)</p> <p><b>Consumer</b> Consumers have standing to file a suit individually or through associations which they provide with a mandate.</p> <p>For a consumer organisation to have standing it must fulfil a set of stringent criteria. Including that it must have been active for at least 3 years and have a specified level of membership. Additionally, it must be able to show that it has the financial resources to pursue the given class action.</p> <p><b>Administrative</b></p> <p>Individuals with a direct interest corresponding to a situation legally protected and associations protecting the interests of its members</p>	<p><b>Admissibility</b> (Para. 8-9)</p> <p>Admissibility is decided upon at the first hearing of the claim.</p> <p>Admissibility criteria: Art. 140-<i>bis</i> Consumer Code states: 'the court establishes if there is a conflict of interest, if the main claimant can adequately represent the interests of the class, and if the rights of the proposed class members are homogenous'.</p> <p><b>Administrative</b></p> <p>The claimant is obliged to send the public body a written warning prior to the commencement of the claim. This must be filed at court.</p>	<p><b>Information on Collective Redress</b> (Para. 10-12, 35-37)</p> <p>Dissemination of information about claims is carried out via consumer organisations.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>There is no national registry and very limited information is available on collective redress issues.</p>	<p><b>Funding</b> (Para. 14-16)</p> <p>Third party funding not used in Italy.</p> <p>Public funding is available to any person whose income falls below the set financial threshold of EUR 10,766.33 per annum.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>In general, there are few sources of private funding and consumer organisations lack sufficient resources. Funding is one of the biggest obstacles for bringing collective proceedings in Italy.</p> <p>There is no obligation on the parties to disclose their source of funding.</p>

	<p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Strict standing rules for organisations means there are few who are actually authorised to bring collective actions.</p>			
<p><b>Cross Border Cases</b> (Para. 17-18)</p> <p>Italian Law permits the participation of foreign claimants.</p> <p>In order to initiate an action, a claimant must first file a complaint with the civil trial court in the capital of the respective region where the corporation's headquarters is based.</p>	<p><b>Expedient procedures for injunctive orders</b> (Para. 19)</p> <p>There is no specific regime for obtaining interim orders. This is governed by the ordinary laws of civil procedure. Where there are justified grounds of urgency, the action for an injunction shall be conducted pursuant to Articles 669-bis to 669-quaterdecies of the Civil Procedure Code.</p>	<p><b>Efficient enforcement of injunctive orders</b> (Para. 20)</p> <p>There is no regime specific to the enforcement of collective procedures and this is governed by the ordinary laws of civil procedure.</p> <p>The deadline for compliance is set out in the order and a fine of between €516 and €1,032 may be imposed for each day of delay in complying.</p>	<p><b>Opt In/Opt Out</b> (Para. 21-24)</p> <p>Opt-In only. This is seen as being in line with Italian constitutional principles and rules of civil procedure.</p>	<p><b>Collective ADR and Settlements</b> (Para. 25-28)</p> <p>There is no court mandated settlement procedure. There is no judicial supervision of the settlement procedure.</p> <p>A settlement is not binding on the non-consenting class action participants and there is no requirement that a settlement must be made available to or cover all the participants in the class action other than the parties to the settlement themselves.</p>



<p><b>Costs</b> (Para. 13)</p> <p>The loser pays principle applies, although, the final allocation of costs is determined by the court.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>The costs of collective actions as compared to individual actions is one of the main barriers to claimants commencing actions.</p>	<p><b>Lawyers' Fees</b> (Para. 29-30)</p> <p>Lawyers and clients are free to enter into fee agreements, under which, fees can be based on a percentage of the amount of compensation awarded in a case.</p> <p>The law prohibits arrangements where the lawyer's fees comprise a share of damages awarded to the successful claimant.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Courts do not have any power to review fee agreements.</p>	<p><b>Prohibition of punitive damages</b> (Para. 31)</p> <p>Extra-compensatory damages are not available.</p> <p><b><u>Skimming off/restitution of profits</u></b></p> <p>Consumers may obtain restitutionary damages/account of profits.</p>	<p><b>Collective Follow- on actions</b> (Para 33-34)</p> <p>It is possible to rely on an administrative decision in a subsequent collective action under Art 140<i>bis</i></p>	<p><b>Interplay between injunctions and compensation across all sectors</b></p> <p>Not possible to seek an injunction and compensation in single action</p> <p>It is possible to rely on an injunction in separate follow on proceedings under Article 139/140.</p>
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<b>LATVIA</b>				
<b>Scope</b>	<b>Standing</b> (Para. 4-7)	<b>Admissibility</b> (Para. 8-9)	<b>Information on Collective Redress</b> (Para. 10-12, 35-37)	<b>Funding</b> (Para. 14-16)
<p>No specific horizontal collective redress mechanism</p> <p>For consumers, there is an out-of-court collective redress controlled by the state institution: Consumer Rights Protection Centre</p> <p>Solely injunctive, compensatory available only if the trader signs written commitment acknowledging the violation</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No specific horizontal collective redress mechanism</p> <p>In many cases, traders do not sign the written commitment because they disagree with the</p>	<p>The Consumer Rights Protection Centre has competence to grant the injunction and set the penalty in cases where a violation of the consumer rights affects the collective interests of consumers.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Doubts whether the Centre can detect all violations</p>	<p>No specific rules of the absence of a horizontal collective redress mechanism</p>	<p>If the trader signs a written commitment acknowledging his or her fault in the determined infringement, the commitment is published in the web site of the Centre as well as in official gazette</p> <p>Web page of the Consumer Rights Protection Centre – decisions in administrative cases and the data base of written commitments (www.ptac.gov.lv).</p>	<p>The Consumer Rights Protection Centre shall finance (from state budget) any collective redress activities</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>The law does not regulate funding.</p>

<p>decision of the Consumers Rights Protection Centre, thus there is no compensation paid to the consumers.</p>				
<p><b>Cross Border Cases</b> (Para. 17-18)</p> <p>There are no special rules regarding cross-border collective redress and no cases reported.</p>	<p><b>Expedient procedures for injunctive orders</b> (Para. 19)</p> <p>If the Consumer Rights Protection Centre has a reason to believe that a violation of consumer rights has been or may be committed and it may cause immediate and significant harm to the economic interests of the particular consumer group, it is entitled to take interim measures.</p>	<p><b>Efficient enforcement of injunctive orders</b> (Para. 20)</p> <p>The trader shall inform the Centre on implementation of the specified activities done according to the decision rendered by the Centre and in case such information is not received by the Centre or the trader has not implemented the activities, Centre applies administrative penalty.</p>	<p><b>Opt In/Opt Out</b> (Para. 21-24)</p> <p>N/a in the absence of a horizontal collective redress mechanism</p> <p>Regarding the out-of-court consumer mechanism: if the trader signs a written acknowledgment of committed violation and provides for reimbursement of the losses caused to the consumer, the consumers must submit a request for payment, thus it implicitly follows an opt-in mechanism</p>	<p><b>Collective ADR and Settlements</b> (Para. 25-28)</p> <p>No specific rules of the absence of a horizontal collective redress mechanism</p>
<p><b>Costs</b> (Para. 13)</p> <p>In the injunction procedure conducted by the Consumer Rights Protection Centre, the trader bears its legal</p>	<p><b>Lawyers' Fees</b> (Para. 29-30)</p> <p>There are no specific rules about funding, an agreement between lawyer and client can</p>	<p><b>Prohibition of punitive damages</b> (Para. 31)</p> <p>Latvian law does not provide for punitive damages.</p>	<p><b>Collective Follow- on actions</b> (Para 33-34)</p> <p>No specific rules of the absence of a horizontal collective redress mechanism</p>	<p><b>Interplay between injunctions and compensation across all sectors</b></p> <p>No specific rules of the absence of a horizontal</p>

<p>costs.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>According to practitioners, if a collective redress mechanism was introduced, the costs of such procedure would be a problem, especially for NGOs.</p>	<p>include contingency fees.</p>			<p>collective redress mechanism</p>
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**LITHUANIA**

<b>Scope</b>	<b>Standing</b> (Para. 4-7)	<b>Admissibility</b> (Para. 8-9)	<b>Information on Collective Redress</b> (Para. 10-12, 35-37)	<b>Funding</b> (Para. 14-16)
<p>Two horizontal mechanisms available</p> <p>1) Action for protection of public interest (injunctive relief)</p> <p>2) Group Action proceedings (injunctive and compensatory relief)</p> <p>Joinder of parties, consolidation of proceedings available.</p>	<p><u>Action for protection of public interest</u> Standing is restricted to a prosecutor, state, municipal authority or other persons identified in law. Precise conditions for standing under this mechanism are contained in sector specific laws e.g. consumer, competition and environmental.</p> <p>The conditions indicated in para 4 (a), (b) of the Recommendation usually are established in the law or indicated by the court practice.</p> <p><u>Group Action proceedings</u> No specific provisions on standing</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p>	<p>Early determination of admissibility questions</p> <p><u>Public Interest</u> Only locus standi is checked</p> <p><u>Group Action Proceeding</u> Upon receipt of claim, defendant has 7 days to respond. Group needs to be constituted between 60-90 days. Requirement of numerosity (20 members of group) and commonality (group share common questions of law and fact, including protection of rights and interests)</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>In practice, the restrictive approach taken by the courts on admissibility and</p>	<p><u>Group Action Proceeding</u> Group representative must publish announcement containing information about the group action.</p> <p>Court required to publish existence of action on internet site of court after acceptance</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No National Registry.</p> <p>Law does not indicate criteria/method for announcement of information by group rep.</p>	<p>No regulation of financing of litigation.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No specific rules on the control of third party funding.</p> <p>Claimant party not required to declare the origin of any funding to the court at the outset of proceedings.</p> <p>No specific rules on whether court is allowed to stay proceedings if the instances outlined in para. 15 of the Recommendation exists</p>

	The rule indicated in para 5 literally does not exist in Lithuania, however, if the person does not meet the criteria established in the laws, the claim will not be accepted by the court.	certification creates difficulties.		
<p><b>Cross Border Cases</b> (Para. 17-18)</p> <p>Apart from Law on Consumer Protection, there are no restrictions</p> <p><u>Public Interest Claims- Consumer Protection</u> Foreign plaintiffs are able to defend the public interest of consumers on on the following conditions:</p> <p>Firstly, they may act only when the activities of the sellers (suppliers) of goods and services, functioning in Lithuania, infringe the legal acts of the European Union, the list of which shall be approved by the Minister of Justice of the Republic</p>	<p><b>Expedient procedures for injunctive orders</b> (Para. 19)</p> <p>Depends on the type of injunctive order being sought.</p> <p>If preliminary: yes If final: no</p>	<p><b>Efficient enforcement of injunctive orders</b> (Para. 20)</p> <p>Injunctive order supported by imposition of criminal liability for breach.</p> <p>No specific rules on monetary sanctions in the regulation of collective redress. The general rule of enforcement and Criminal Code are applied.</p>	<p><b>Opt In/Opt Out</b> (Para. 21-24)</p> <p>Opt-in for both group actions and public interest.</p> <p><u>Group Action</u> Conditions prescribed by law (Art. 441 of the Civil Procedure Code)</p> <p>a) Ind. Needs to express consent in written form</p> <p>b) Statement submitted to group rep</p> <p>Each member of the group action is able to exercise his/her right to leave the group, normally before the adoption of the final decision on the composition of the group</p>	<p><b>Collective ADR and Settlements</b> (Para. 25-28)</p> <p>Parties are encouraged to settle compensation disputes consensually or out of court.</p> <p>Court shall check settlement agreements concerning capability, imperative norms and public interests.</p> <p>No collective ADR available</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No appropriate_collective ADR available</p>

<p>of Lithuania. Secondly, they have an obligation to consult in writing with the State Consumer Rights Protection Authority. Furthermore, foreign plaintiffs likewise have to apply to the seller or service provider before bringing the claim before the court.</p>			<p>by the court.</p> <p>A party may join the group after the stage of admissibility and certification if group rep. and defendant consents.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Member not freely able to leave group before final judgement.</p>	
<p><b>Costs</b> (Para. 13)</p> <p>The 'loser pays' principle applies.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Practitioners find collective proceedings too costly, and a disincentive to using a</p>	<p><b>Lawyers' Fees</b> (Para. 29-30)</p> <p>Success/contingency fees allowed</p> <p><b><u>Lawyers' fees and unnecessary litigation</u></b></p> <p>Civil procedure code inserts requirement that only expenses that are reasonable and necessary recoverable. No cap in group action</p> <p><b><u>Problems/ Incompatibilities with Recommendation</u></b></p>	<p><b>Prohibition of punitive damages</b> (Para. 31)</p> <p>Punitive or extra-compensatory damages not allowed</p> <p>Skimming off/restitution of profits not available</p>	<p><b>Collective Follow- on actions</b> (Para 33-34)</p> <p>There is no specific requirement that the subsequent private proceedings start only after the conclusion of the public authority action.</p> <p>There are no special limitation rules in follow-on cases.</p> <p><b><u>Problems/ Incompatibilities with Recommendation</u></b></p>	<p><b>Interplay between injunctions and compensation across all sectors</b></p> <p>Group Action proceedings allow injunction and compensation within one single action in all areas.</p> <p>Possible to rely on injunction in separate follow on damages action.</p> <p><b><u>Problems/ Incompatibilities with</u></b></p>

<p>collective mechanism to resolve disputes.</p>	<p><b><u>principles</u></b></p> <p>No restrictions on use of success/contingency fees</p>		<p><b><u>principles</u></b></p> <p>No specific requirement that the subsequent private proceedings start only after the conclusion of the public authority action.</p>	<p><b><u>Recommendation principles</u></b></p> <p>No specific general rule concerning prejudicial facts exist in case the person was not involved in the proceeding</p>
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<b>LUXEMBOURG</b>				
<b>Scope</b>	<b>Standing</b> (Para. 4-7)	<b>Admissibility</b> (Para. 8-9)	<b>Information on Collective Redress</b> (Para. 10-12, 35-37)	<b>Funding</b> (Para. 14-16)
<p>No specific horizontal class action mechanism</p> <p>Sectoral mechanism available in consumer and competition law</p> <p>Traditional devices for multi-party proceedings are available (joinder), as well as one specific type of representative action: duly qualified organisations can request the judicial review of an administrative decision issued by a public body</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Collective redress mechanisms are limited to consumer and competition law</p> <p>Solely injunctive</p>	<p>An individual, professional group or accredited consumer association can bring the claim</p> <p>Only authorised so far is the ULC (<i>'Union Luxembourgeoise des Consommateurs'</i>)</p>	<p>The Luxembourg group action follows a summary proceeding to obtain an injunction. It is a one stage process, and the cessation of the infringement may be ordered even in the absence of evidence of actual loss or damage, or negligence on the part of the defendant.</p>	<p>The Court may order a publication of the decision: to be displayed outside the business facilities of the defendant, in newspapers, or by any other means</p> <p>Costs to be borne by the defendant</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No National Registry</p>	<p>Currently, the only entity which has been allowed to file a group action is the ULC, which is financially assisted by the State</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Third-party funding is unknown in Luxembourg</p> <p>However no legal or regulatory provisions prohibits a third party from funding a claim</p>

<p>The right to compensation and the right to access to justice remain theoretical for Luxembourg consumers</p>				
<p><b>Cross Border Cases</b> (Para. 17-18)</p> <p>There are no specific rules or limitations as to the participation of foreign claimants</p>	<p><b>Expedient procedures for injunctive orders</b> (Para. 19)</p> <p>The Court can order any protective or interim measures to prevent a damage or put an end to a violation</p>	<p><b>Efficient enforcement of injunctive orders</b> (Para. 20)</p> <p>Any failure to comply with the injunctions or prohibitions imposed by a final decision shall be punishable by a fine (from 251 to 120 000 euros)</p>	<p><b>Opt In/Opt Out</b> (Para. 21-24)</p> <p>The organisation brings the claim in the general interest of the consumers, and does not represent a class of identified members. There is no mechanism of opting-in or out.</p>	<p><b>Collective ADR and Settlements</b> (Para. 25-28)</p> <p>The court can encourage the parties to settle, and the parties can chose to do so at any time.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No specific collective ADR mechanisms</p>
<p><b>Costs</b> (Para. 13)</p> <p>The losing party usually does not bear the legal costs: each party bears its own. However, the successful party may recover a procedural indemnity from the losing party, the amount being determined by the judge.</p>	<p><b>Lawyers' Fees</b> (Para. 29-30)</p> <p>Contingency fees are prohibited. However, a lawyer and his client may enter into an agreement providing for a supplementary fee based on the result obtained</p>	<p><b>Prohibition of punitive damages</b> (Para. 31)</p> <p>Luxembourg law does not allow damages to be punitive or exemplary.</p>	<p><b>Collective Follow- on actions</b> (Para 33-34)</p> <p>An injunction/sanction from the Luxembourg Competition Authority constitutes an irrefutable evidence of fault for the purpose of an individual action for compensation.</p> <p><b><u>Problems/</u></b></p>	<p><b>Interplay between injunctions and compensation across all sectors</b></p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Group actions in Luxembourg cannot give</p>

<p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>In practice, consumer associations have concerns as to the potential difficulty of facing court costs, were a compensatory collective redress mechanism to be implemented. They believe costs might act as a deterrent factor in bringing claims.</p>			<p><b><u>Incompatibilities with Recommendation principles</u></b></p> <p>The follow-on compensatory action can only be individual.</p>	<p>rise to any compensation</p>
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<b>MALTA</b>				
<b>Scope</b>	<b>Standing</b> (Para. 4-7)	<b>Admissibility</b> (Para. 8-9)	<b>Information on Collective Redress</b> (Para. 10-12, 35-37)	<b>Funding</b> (Para. 14-16)
<p>Two horizontal mechanisms available: (a) Collective Action (b) Collective Proceedings action</p> <p>Both mechanisms allow for <b>injunctive and compensatory</b> relief</p>	<p><u>Collective Proceedings</u></p> <p>A distinction is made between a representative action (brought by a registered consumer association or an <i>ad-hoc</i> constituted body on behalf of class members) and a group action (brought by a class representative on behalf of class members).</p> <p>Consumer association or an <i>ad-hoc</i> constituted body needs to show that there is no material interest that is in conflict with the interests of the class members</p> <p>A class representative (not being a registered consumer association) must have also have a claim which falls within the proposed collective proceedings, is expected to act fairly and adequately act in the</p>	<p>Court determines of its own motion whether the statutory eligibility requirements have been met.</p>	<p>Decree of group constitution and issues is to be published in the Government Gazette and in a local English and Maltese newspaper and in any other media with an invitation to any other third parties who wish to be class members must indicate their intention to do so within roughly 5 months from the date of the decree</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No national registry Absence of proper framework for dissemination of information</p>	<p>No provisions on third party litigation funding.</p> <p>Champerty is not allowed</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No framework for the provision of funding. Law falls short of the Recommendation, in particular points 14, 15, 16 and 32</p>

	<p>interests of the class members; and must not have, in relation to the common issues for the class members, a material interest that is in conflict with the interests of the class members.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Public authorities are not empowered to bring representative actions.</p> <p>In the case of a representative action brought forward by a registered consumer association, there are no requirements as to its sufficient capacity (financial resources, humans resources and legal expertise) to properly represent the class members in their best interests.</p>			
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<b>Cross Border Cases</b> (Para. 17-18)	<b>Expedient procedures for injunctive orders</b> (Para. 19)	<b>Efficient enforcement of injunctive orders</b> (Para. 20)	<b>Opt In/Opt Out</b> (Para. 21-24)	<b>Collective ADR and Settlements</b> (Para. 25-28)
<p>National rules on admissibility or standing facilitate foreign claimant or foreign representative entity involvement.</p>	<p>Interim injunctive order possible. The court is required at law to deliver the judgment on whether the warrant is to be upheld permanently within 1 month from the date the application for injunction was filed.</p>	<p>A warrant for prohibitory injunction is deemed to be a court order. Breach of such order is a criminal offence.</p>	<p>Opt-in by express consent and requirement of collective proceedings agreement. Conditions prescribed by law, supplemented by discretion of the judge.</p> <p>Class member who does not opt-in by the time period laid down in decree, may only opt in with special leave from the court if the delay was not attributable to the applicant and the continuation of the proceedings would not suffer substantial prejudice if permission were granted.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Likely that class member can opt-out if he or she is permitted to do so in terms of the collective proceedings agreement.</p>	<p>A class representative may only reach a compromise with the defendant/s with the permission of the court. The court will require the class representative to inform the court on how he intends to notify the class members and on the terms of the proposed compromise. In line with the opt-in principle, any class member may, with the permission of the court, be omitted from the compromise. Court approves compromise.</p>

			The right of a class member to opt-out at any stage during the collective proceedings should be introduced in the Act, naturally subject to certain conditions on sharing of costs and other pertinent issues.	
<p><b>Costs</b> (Para. 13)</p> <p>The 'loser pays' principle applies</p> <p><b>Note:</b> Possible penalty of €2,500 imposed where court finds that the collective proceedings were frivolous or vexatious</p>	<p><b>Lawyers' Fees</b> (Para. 29-30)</p> <p>Advocates are not allowed to agree to a stipulation quotae litis.</p> <p>Fees are to be in line with a tariff established by law</p>	<p><b>Prohibition of punitive damages</b> (Para. 31)</p> <p>Punitive damages not allowed.</p> <p><u>Extra-compensatory damages and their conditions</u></p> <p>The damages which may be claimed are either patrimonial, which refer to losses suffered directly by the claimant's patrimony or estate, whether past, present or future, or non-patrimonial, which refer to moral anguish and pain and suffering.</p>	<p><b>Collective Follow- on actions</b> (Para 33-34)</p> <p>Collective follow-on actions possible in competition law</p>	<p><b>Interplay between injunctions and compensation across all sectors</b></p> <p>Injunctive and compensatory relief may be sought within single proceedings. At present in consumer and competition cases.</p> <p>Follow-on damages actions may rely on injunctions order. Available in Consumer, Competition cases.</p>

**THE NETHERLANDS**

<b>Scope</b>	<b>Standing</b> (Para. 4-7)	<b>Admissibility</b> (Para. 8-9)	<b>Information on Collective Redress</b> (Para. 10-12, 35-37)	<b>Funding</b> (Para. 14-16)
<p>The Dutch system provides for three types of horizontal collective redress mechanisms:</p> <ul style="list-style-type: none"> <li>- Collective Settlements of Mass Claims Acts (WCAM)</li> <li>- Collective action, on the basis of articles 3:305a-305d Dutch Civil Code (solely injunctive/declaratory )</li> <li>- Action on the basis of mandate/power of attorney and/or transfer/assignment of claims to a special purpose vehicle (compensatory and injunctive)</li> </ul>	<p>Only non-profit entities, either ad hoc or pre-existing, that meet certain criteria, can act in collective actions or conclude collective settlements</p> <p><b>Collective Action</b> Interests have to be sufficiently alike in order to be bundled for efficient and effective legal protection.</p> <p><b>WCAM</b> Only the party or parties compensating the damages or contributing to the settlement fund and an entity representing the victims will conclude a settlement agreement</p> <p><b>SPV</b> No need to be non-profit. Standing derives from the standing of the claimants represented,</p>	<p>In all three mechanisms, the legal capacity of the entities will be checked, as well as their purpose to protect specific interests in their articles of associations</p> <p>The WCAM procedure is a settlement that the parties reach out of court, and then submit to the court. The court will only consider if the compensation is “reasonable” to make it binding.</p>	<p><b>WCAM</b> Publication in newspapers, websites, individual letters, bailiff notifications, etc.</p> <p><b>Problems/ Incompatibilities with Recommendation principles</b></p> <p>No data on the number of actions launched on the basis of mandate and/or transfer of claims.</p> <p>National Registry not available</p>	<p>In collective actions funding is often obtained via contributions from individuals whose interests are at stake or who have an idealistic purpose in supporting the organisation.</p> <p>Actions on the basis of mandate and or/transfer of claims are typically financed via individual contracts by the claimants with the special purpose vehicle. The contract often stipulates that claimants will receive the award minus a percentage. Increasingly, ad hoc entities receive third party funding from commercial litigation funders or legal expense insurers.</p> <p><b>Problems/ Incompatibilities with Recommendation</b></p>



	<p>which means that (a) the claimant itself must previously have had standing as being directly harmed, and (b) the claimant must be properly represented, i.e. the entity must have a valid mandate to act in the name of the claimant, or the claim must have been transferred to the entity</p> <p>The entities must have the goal of protecting the concerned interests.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>In a collective action, the court does not check whether the claim sufficiently protects the interests of the persons concerned. Concerns that this leaves room for some entities to bring claims out of a purely financially driven motive.</p> <p>The requirement that the</p>			<p><b><u>principles</u></b></p> <p>Third party funding is allowed and currently unregulated.</p>
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	entities prove to the court that they have the administrative and financial capacity to bring a claim is part of a recent Bill making its way through the Dutch Parliament on collective damages actions			
<p><b>Cross Border Cases</b> (Para. 17-18)</p> <p><b>Collective Action</b> No limitation regarding nationality; foreign plaintiffs can make use of the Dutch collective action as long as the articles of association of the respective organization cover the scope of the action and include the interests of the foreign parties.</p> <p><b>WCAM</b> A foreign representative organisation can participate in the WCAM procedure, as long as it has full legal capacity to act in court.</p> <p><b>SPV</b></p>	<p><b>Expedient procedures for injunctive orders</b> (Para. 19)</p> <p>Expedient procedure for injunctive orders via Kort Geding procedure</p>	<p><b>Efficient enforcement of injunctive orders</b> (Para. 20)</p> <p>Ordinary monetary fines are available</p>	<p><b>Opt In/Opt Out</b> (Para. 21-24)</p> <p><b>WCAM</b> Procedure operates on an opt-out basis. The class must be clearly defined in the settlement agreement. After court approval, the settlement has a binding effect on all victims included in the terms of the settlement, except for those who have declared their wish to opt-out within the time set by the court.</p> <p><b>Collective Action</b> Procedure binds only the parties to the proceedings. However, those affected by the injunction may opt-out from the effect of the</p>	<p><b>Collective ADR and Settlements</b> (Para. 25-28)</p> <p><b>WCAM</b> The WCAM is a settlement procedure: the parties must reach an agreement which then is submitted to the court to make it binding.</p> <p>Regarding the other mechanisms, the organization bringing the claim must have tried to reach an agreement out of court before initiating the action.</p> <p>Article 1018a Civil Code of Procedure that facilitates the appointment of mediation in relation to</p>

<p>Foreign plaintiffs can participate on the same basis as Dutch plaintiffs in actions on the basis of mandate and/or transfer of claims if the law governing the mandate or transfer allows it, and the mandate or transfer is valid.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>The WCAM procedure operates on an opt-out basis and every member included in the settlement who does not opt-out in time is bound by that settlement, including foreign parties.</p> <p>It has been untested so far whether such a settlement would be recognised and enforced in jurisdictions that view the opt-out device as problematic.</p>			<p>judgment by simply (without formal requirements) contesting that effect.</p> <p><b><u>SPV</u></b></p> <p>Actions are only binding on those who have joined the proceedings (or claims adjudicated therein).</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>The WCAM procedure operates on an opt-out basis and every member included in the settlement who does not opt-out in time is bound by that settlement, including foreign parties.</p> <p>Dutch court can bind a large number of parties without their explicit consent, except if the parties enter the proceedings or, within the appointed period, send an opt-out declaration</p>	<p>mass disputes</p>
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<p><b>Costs</b> (Para. 13)</p> <p>The 'loser pays' principle applies, although the court might lower the costs depending on the complexity of the case.</p> <p><b>WCAM</b></p> <p>Court may declare that the costs are to be paid by one or more of the petitioners, but typically each party bears its own costs</p>	<p><b>Lawyers' Fees</b> (Para. 29-30)</p> <p>Contingency fees are not permitted, as provided by the Dutch Bar Association's Code of Conduct.</p> <p><b>Collective Action</b></p> <p>The remuneration system for lawyers provides too little incentive to take part in collective redress proceedings and accordingly does not facilitate or encourage unnecessary litigation</p>	<p><b>Prohibition of punitive damages</b> (Para. 31)</p> <p>Punitive damages are unavailable</p>	<p><b>Collective Follow- on actions</b> (Para 33-34)</p> <p>Individual compensatory redress starts only after the final injunction/declaratory decision on a breach of law.</p> <p>Limitation periods can be suspended collectively by a letter from an organisation that is entitled to start a collective action Such a letter or the start of a collective action bars the statute of limitation. Suspension continues for 6 months after the judgment in which period parties have the opportunity to start individual actions.</p>	<p><b>Interplay between injunctions and compensation across all sectors</b></p> <p>Injunctive and compensatory actions may be brought within the single SPV proceedings</p> <p><b>Collective Action</b></p> <p>There is no res judicata effect of the judgement in relation to individual group members and the exact effect in a subsequent individual compensatory proceeding is unclear. A favourable judgement will be helpful but defendant may raise a defence.</p>
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POLAND				
Scope	Standing (Para. 4-7)	Admissibility (Para. 8-9)	Information on Collective Redress (Para. 10-12, 35-37)	Funding (Para. 14-16)
<p>Polish civil procedure provides for:</p> <ul style="list-style-type: none"> <li>- A class action procedure of judicial nature (injunctive and compensatory) available for: consumer law, product liability, other tort liability cases (environmental protection law, competition law, IP law, labour law, as far as they concern tortious acts).</li> <li>- A representative procedure of an administrative nature in consumer cases (injunctive)</li> </ul>	<p>The class representative in Poland is the 'named party' who brings the case in his own name but on behalf of all class members. The Act limits the persons who can represent the class to two categories:</p> <ul style="list-style-type: none"> <li>- class members</li> <li>- regional consumer ombudsmen.</li> </ul> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>A number of problems arise with regard to the regional consumer ombudsmen's potential role in class actions. They may not have the territorial and financial 'reach' necessary to organize and coordinate a class action. The prerogatives of consumer ombudsmen, as specified by</p>	<p>There are four distinct stages in the class action procedure. In the first stage, the court notifies the defendant of the lawsuit, and considers whether all the requirements have been met (at least ten people with claims of the same kind and with the same or similar factual basis) and thus whether the class action can be certified.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>The admissibility phase usually takes at least two years (the total average duration of a non-collective case brought before the court of first instance in Poland, for instance), ultimately excessively extending</p>	<p>After the class certification decision is final, the court issues a statement on the commencement of the class action, including information that potential class members can join the class within a period specified by the court</p> <p>The Minister of Justice is also required to publish information about all class actions in which the statement on the commencement has been issued. However, no such information has been published yet by the Ministry.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No national registry</p>	<p>The Class Actions Act does not allow class representatives to obtain legal aid (which in Poland consists of legal assistance nominated by court and a waiver of court fees). The only types of available funding are: contingency fee agreements (success fees) with lawyers, and private funding. In fact, most cases are self-funded privately by each class member.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Third party funding is not prohibited and unregulated.</p>

	legislation, cover protection of consumer rights: they cannot represent persons who are not consumers.	the overall duration of the collective redress proceedings.		
<p><b>Cross Border Cases</b> (Para. 17-18)</p> <p>The class action procedure is not limited in scope to domestic cases only. It is also not limited to Polish citizens.</p>	<p><b>Expedient procedures for injunctive orders</b> (Para. 19)</p> <p>The consumer injunctions procedure includes a possibility of an interim decision by the Head of UOKiK, if it is probable that the conduct, if continued, may cause serious and irrevocable damage to the collective interests of consumers. This interim relief decision can remain in force until the final decision in the case is taken.</p>	<p><b>Efficient enforcement of injunctive orders</b> (Para. 20)</p> <p>The Class Action Act does not contain specific rules on interim measures. The general rules from the Code of Civil Procedure applies.</p> <p>Possibility to obtain an 'execution title': needs to be duly authorised by a court in order to become an execution title that can be used by the execution authorities (including the bailiff).</p>	<p><b>Opt In/Opt Out</b> (Para. 21-24)</p> <p>The Polish Class Action procedure is an opt-in procedure.</p> <p>The Class Action Act requires that class members who have monetary claims make them equal with the other class members. This standardisation requirement means that those who decided to opt in may sometimes need to modify their claims to make them equal with the others.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>The standardisation requirement constitutes an exception from the principle of full</p>	<p><b>Collective ADR and Settlements</b> (Para. 25-28)</p> <p>Class Actions Act: the Court may refer the parties to mediation at any stage of the proceedings.</p> <p>Code of Civil Procedure: the judge in the case should encourage the parties to settle the dispute.</p> <p>The court will approve the settlement unless it is apparent from the circumstances that it is contrary to law or to the principles of social cooperation.</p>

			compensation, and was criticized as unconstitutional. It causes many substantive and procedural problems for class members.	
<p><b>Costs</b> (Para. 13)</p> <p>Following the 'loser pays rule', the losing party covers the other party lawyers' fees only up to the tariff rate established by law.</p> <p>The law also provides a number of restrictions to the loser pays principle (if a party only partly won, unreasonable behaviour...)</p>	<p><b>Lawyers' Fees</b> (Para. 29-30)</p> <p>The Class Actions Act allows lawyers to agree to a success fee as the only form of remuneration. It appears that in practice these types of agreements are extremely rare.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Contingency fees are allowed.</p>	<p><b>Prohibition of punitive damages</b> (Para. 31)</p> <p>No punitive damages are allowed under Polish civil law.</p>	<p><b>Collective Follow- on actions</b> (Para 33-34)</p> <p>The judgement concluding a declaratory relief class action may be used in further individual litigation or ADR proceedings seeking individual redress.</p>	<p><b>Interplay between injunctions and compensation across all sectors</b></p> <p>The Polish Class Actions Act does not contain specific provisions on the types of remedies available. However article 2.3 of the Act provides that, in an action involving a monetary claim, the claim "may be limited" to the defendant's liability. Thus in theory, it is possible to seek injunction and compensation in one single claim. However in practice, the limitation in article 2.3 is applied because of the difficulties caused by the "standardisation" requirement. Class actions are limited to declaratory relief, and</p>

				<p>the decision is then used as a base for individual compensation.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>For compensatory claims, the standardisation requirement means reducing claim amounts to the level of the person whose damages are the lowest in the class. Lawyers representing class members report that they advise them to limit the claim to declaratory relief only, to then use the injunction as a base for individual compensatory claims.</p>
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<b>PORTUGAL</b>				
<p><b>Scope</b></p> <p>No general collective redress mechanism</p> <p>Sectoral: public health, environment, quality of life, protection of consumers, cultural heritage and public domain</p> <p>The administrative code contains a provision</p> <p>Both injunctive and compensatory</p>	<p><b>Standing</b> (Para. 4-7)</p> <p>Any citizen in the enjoyment of their civil and political rights has standing, as well as associations or foundations whose purpose is to defend the interests at stake</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Standing is not solely granted to non-profit entities.</p>	<p><b>Admissibility</b> (Para. 8-9)</p> <p>The admissibility of the claim is dealt with in the first stage of a collective action</p>	<p><b>Information on Collective Redress</b> (Para. 10-12, 35-37)</p> <p>The law mandates the publication of the decision in at least two newspapers deemed to be read by those interested in the matter. Costs are borne by the defendant.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No national registry</p>	<p><b>Funding</b> (Para. 14-16)</p> <p>Public funding is available under the general terms applicable to all processes and courts, with grounds in economic necessity.</p> <p>The courts have no jurisdiction to regulate funding proposals.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>The parties are not required to disclose their source of funding.</p> <p>There is no provision specific to third party funding</p>
<p><b>Cross Border Cases</b> (Para. 17-18)</p> <p>There are no specific rules or limitations as to the participation of</p>	<p><b>Expedient procedures for injunctive orders</b> (Para. 19)</p> <p>Conservatory and temporary measures</p>	<p><b>Efficient enforcement of injunctive orders</b> (Para. 20)</p> <p>Decisions and settlements can be enforced in terms</p>	<p><b>Opt In/Opt Out</b> (Para. 21-24)</p> <p>Opt-out system: the claimant represents, without the need for a</p>	<p><b>Collective ADR and Settlements</b> (Para. 25-28)</p> <p>The matters referring to the interests in question</p>

<p>foreign claimants</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Opt-out is not restricted to in-jurisdiction claimants</p>	<p>may be decided, under the general rules of the Civil Procedure Code.</p>	<p>stipulated in general in Civil Procedure Code.</p>	<p>mandate or express authorization, all the other holders of the rights or interests in question The Public Prosecutor is responsible for protecting the interests of the individuals.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>If the party does not opt out within the term fixed by the judge, it is considered as an acceptance (although still possible to opt out until the end of the collection of evidence)</p>	<p>in the class actions can be referred to an ombudsman. Where the parties agree, mediation and arbitration are also available.</p>
<p><b>Costs (Para. 13)</b></p> <p>After the judgment, the claimant is exempted of any payment in cases of a favourable (even in a partially favourable) judgment. Otherwise, costs are decided by the court, taking into account the</p>	<p><b>Lawyers' Fees (Para. 29-30)</b></p> <p>Contingency fees are prohibited</p>	<p><b>Prohibition of punitive damages (Para. 31)</b></p> <p>Extra-compensatory damages are not available.</p>	<p><b>Collective Follow- on actions (Para 33-34)</b></p> <p>No collective follow on actions.</p>	<p><b>Interplay between injunctions and compensation across all sectors</b></p> <p>It is possible to seek both an injunction and compensation in the same action.</p>

economic situation of the claimant and ground for the judgement				
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**ROMANIA**

<b>Scope</b>	<b>Standing</b> (Para. 4-7)	<b>Admissibility</b> (Para. 8-9)	<b>Information on Collective Redress</b> (Para. 10-12, 35-37)	<b>Funding</b> (Para. 14-16)
<p>No horizontal mechanism but procedural mechanisms of co-participation and voluntary intervention available.</p> <p>A sectoral mechanism in consumer law is available and allows <b>injunctive</b> relief only.</p>	<p>Representative consumers associations ("RCPA") can bring legal actions in order to defend the legitimate interests and rights of the consumers</p> <p>RCPA must have a minimum of 3000 members in at least 10 counties and an activity on behalf of the consumers of at least 3 years.</p> <p>Public Prosecutor in Public Ministry also empowered to join consumer actions</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>The conditions for standing are very restrictive, limiting in practice the potential representative entities.</p>	<p>Court determines whether the statutory eligibility requirements have been met.</p> <p>Legal actions must satisfy the normal requirements for any legal action: legal capacity and legitimate interest.</p>	<p>Information available on collective redress actions by individual parties and through court websites.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No national registry</p>	<p>No regulation of third party funding.</p> <p>Limited funding comes from state via aid to persons in financial difficulty.</p> <p>Court has no authority to limit or condition funding, especially since this is expected to be a confidential matter of the plaintiffs.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No framework for the provision of funding. Law falls short of the Recommendation, in particular points 14, 15, 16 and 32</p>

<p><b>Cross Border Cases</b> (Para. 17-18)</p> <p>Cross border relief is possible, where the locus standi is in a different jurisdiction</p>	<p><b>Expedient procedures for injunctive orders</b> (Para. 19)</p> <p>Courts empowered to give preference and to accelerate the hearing of cases where it is about abusive clauses, especially in the banking and financial sectors.</p> <p>The deadline to complete a case in all the degrees of jurisdictions is between 2 to 4 years</p>	<p><b>Efficient enforcement of injunctive orders</b> (Para. 20)</p> <p>The plaintiffs may seek from the court to order interim measures consisting of freezing certain assets/bank account of the defendants to secure payment of damages, if this will be awarded by the court at the end of the court case</p>	<p><b>Opt In/Opt Out</b> (Para. 21-24)</p> <p>Opt-in by voluntary intervention.</p> <p>Conditions prescribed by law, supplemented by discretion of the judge.</p>	<p><b>Collective ADR and Settlements</b> (Para. 25-28)</p> <p>If the plaintiffs are also companies, the court may ask the parties to find an amicable settlement of their dispute and give a term for reaching a settlement.</p>
<p><b>Costs</b> (Para. 13)</p> <p>The 'loser pays' principle applies but the court may order a reduction of the lawyers' fees to be paid, if these are deemed excessive.</p> <p>Claims introduced by the RCPAs are exempted from the payment of stamp duties.</p> <p><b><u>Problems/ Incompatibilities with Recommendation</u></b></p>	<p><b>Lawyers' Fees</b> (Para. 29-30)</p> <p>Contingency fees are, as a matter of principle, prohibited by the Lawyers Statutes.</p> <p>However, success fees are becoming frequent and can be used to circumvent the prohibition.</p> <p><b><u>Problems/ Incompatibilities with Recommendation</u></b></p>	<p><b>Prohibition of punitive damages</b> (Para. 31)</p> <p>Punitive damages or extra-compensatory damages not available</p> <p><b><u>Extra-compensatory damages and their conditions</u></b></p> <p>In case of joint actions introduced by undertakings, the compensation would include the non-realised profit (lucrum cessans),</p>	<p><b>Collective Follow- on actions</b> (Para 33-34)</p> <p>Individual actions for damages start after final injunction order in consumer cases. Co-participation mechanism used in such cases.</p>	<p><b>Interplay between injunctions and compensation across all sectors</b></p> <p>It is possible to seek an injunction and compensation in a single action. However, the injunction is of an interim nature.</p>

<p><b><u>principles</u></b></p> <p>The fact that the victims must pay upfront the stamp duties and all the legal costs may in practice act like a break on the actions they introduce in order to receive compensation. The judicial aid lack sufficient resources in order to ensure that this gap is covered by the State.</p>	<p><b><u>principles</u></b></p> <p>No control over the rise/use of success fees</p>	<p>in addition to the effective damage (damnum emergens).</p>		
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<b>SLOVENIA</b>				
<b>Scope</b>	<b>Standing</b> (Para. 4-7)	<b>Admissibility</b> (Para. 8-9)	<b>Information on Collective Redress</b> (Para. 10-12, 35-37)	<b>Funding</b> (Para. 14-16)
<p>There is currently no horizontal collective redress mechanism although a proposal for an act based on the Commission Recommendation is being considered by the legislature ('CRA').</p> <p>Currently collective redress is available in consumer claims under the Consumer Protection Act (CPA). This provides for injunctive relief only.</p> <p>The Environment Protection Act provides for a collective action in environmental cases.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Currently (notwithstanding the CRA) there is no horizontal procedure.</p>	<p>Existing consumer protection organisations have standing to bring collective actions</p> <p>Under the CRA not for profit private law entities are able to start a collective action where there is a close connection between the aims of the organisation and the rights violated. The CRA also allows for ad hoc organisations founded with the aim of organising the collective redress.</p> <p>Under the CRA discrimination actions can be brought by the Equal Rights Ombudsman or a recognised NGO operating in the field.</p>	<p>Under the CRA, admissibility is decided at the first stage in the proceedings. In determining the admissibility of the action the court will consider:</p> <p>The size of the class Whether aggregate damages can be determined Whether collective proceedings are an efficient way of dealing with the common issues. Whether an alternate method of dispute resolution is available/suitable.</p>	<p>Under the CRA proposal the main route for the dissemination of information about collective redress is the national registry.</p> <p>The court may make the certification of a claim conditional on the claimant undertaking certain actions regarding the dissemination of information regarding the action.</p>	<p>Third party funding is permitted.</p> <p>The claimant must publicly inform the court of its source of funds. The court will not certify a collective action where there is a conflict of interest between the funder and the claimant.</p> <p>Third parties are prevented from funding actions against competitors. They are also prevented from influencing the procedural choices of the claimant.</p>

<b>Cross Border Cases</b> (Para. 17-18)	<b>Expedient procedures for injunctive orders</b> (Para. 19)	<b>Efficient enforcement of injunctive orders</b> (Para. 20)	<b>Opt In/Opt Out</b> (Para. 21-24)	<b>Collective ADR and Settlements</b> (Para. 25-28)
<p>Foreign claimants can participate in collective proceedings.</p> <p>Under the CPA injunctive claims can be filed by independent public authorities established in other member states provided that the actions complained of affect consumers in that member state.</p>	<p>Time limits and procedures are the same for all collective actions</p> <p>Under the CRA the claimant can request a temporary injunctive measure prior to the commencement of the main action and even before the harmful acts have commenced.</p>	<p>Under the Claim Enforcement and Security Act the enforcement of injunctive orders is supported by a series of fines.</p>	<p>The position of opt in or opt out is not covered by the current legislation. Declaratory judgments relating to certain contractual provisions will be binding in further consumer cases concerning those provisions</p> <p>The CRA provides for both opt in and opt out procedures. Which one will be used is at the discretion of the judge who must consider all the circumstances of the case.</p> <p>The opt-out procedure is justified by the sound administration of justice where the individual claims are of low value</p> <p>In cross border cases the opt-in procedure is mandatory.</p> <p><b>Problems/</b></p>	<p>Under the CRA Proposal the parties are encouraged to settle disputes by alternative means. At the outset the parties can be referred to mediation. The court can assist in the settlement</p> <p>The court will review and approve any settlement reached by the parties</p> <p>The parties can also reach out of court settlements. These are considered contracts and fresh proceedings must be brought to enforce them.</p>



			<p><b>Incompatibilities with Recommendation principles</b></p> <p>Both opt-out and opt-in procedures are possible.</p>	
<p><b>Costs (Para. 13)</b></p> <p>The general rule is that the loser pays. The court fees as well as costs depend on the overall value of the claim. Under the CRA the value is set at 20% of the full amount of the individual claims of the group or 20% of the aggregate amount of damages.</p> <p>The costs include those which were necessary both in filing the action and informing group members Individual group members are neither liable for costs nor entitled to have their costs reimbursed. The costs liability falls on the representative.</p>	<p><b>Lawyers' Fees (Para. 29-30)</b></p> <p>The CRA allows for a limited form of contingency fee arrangement:</p> <p>Lawyers can obtain up to 15% of the final judgment or, if the lawyer accepts the entire costs risks of the proceedings 30%. The court has to approve that the agreement is reasonable at the certification stage.</p> <p>Lawyers' fees do not incentivise unnecessary litigation.</p>	<p><b>Prohibition of punitive damages (Para. 31)</b></p> <p>Extra-compensatory damages are not available.</p>	<p><b>Collective Follow- on actions (Para 33-34)</b></p> <p>Under the CRA follow on actions are available in competition cases. The limitation period is suspended from the commencement of the administrative proceedings until the end of one year following the administrative decision.</p> <p>Where a collective action has commenced and the administrative authority subsequently takes action the collective claim shall be stayed until the end of the administrative proceedings.</p>	<p><b>Interplay between injunctions and compensation across all sectors</b></p> <p>Under the CPA, there is no basis for bringing a collective compensation claim based on an injunction.</p> <p>Under the CRA decisions regarding injunctive proceedings will be binding on other courts as to the liability of the defendant.</p> <p>There is no explicit option to bring both an injunctive and compensatory claim together. This will be at the discretion of the court.</p>

SLOVAKIA				
Scope	Standing (Para. 4-7)	Admissibility (Para. 8-9)	Information on Collective Redress (Para. 10-12, 35-37)	Funding (Para. 14-16)
<p>No comprehensive collective redress regime</p> <p>Code of Civil Procedure (sec. 126 CSP) contains rules for the management of mass judicial claims where at least 10 submissions are addressed to the same court by the same entity during one day.</p> <p>Abstract control in consumer law (sec. 301 et seq. CSP). Erga omnes effect of judicial decisions relating to unfair contractual terms or unfair competition.</p> <p>Representative action in consumer and competition law</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p>	<p>Consumer associations or groups of consumers</p> <p>Abstract control: Consumer associations and supervisory authorities</p>	<p>No specific rules</p>	<p>Court may allow to a successful party of the dispute to publish the judgement at the costs of the losing party</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>No registry for collective actions</p>	<p>No specific rules</p>

No functioning regime for collective claims				
<p><b>Cross Border Cases</b> (Para. 17-18)</p> <p>There are no special rules regarding cross-border collective redress and no cases reported.</p>	<p><b>Expedient procedures for injunctive orders</b> (Para. 19)</p> <p>Extended lis pendens and res judicata effect in injunctive proceedings against acts of unfair competition. Affected persons may not be allowed to actively participate in the proceedings, and their individual actions in the same case are not admissible, but nonetheless (controversially) the decision is binding on them.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principle</u></b></p> <p>Limitation of right of access to court.</p>	<p><b>Efficient enforcement of injunctive orders</b> (Para. 20)</p>	<p><b>Opt In/Opt Out</b> (Para. 21-24)</p> <p>No proper compensatory collective redress mechanism</p>	<p><b>Collective ADR and Settlements</b> (Para. 25-28)</p> <p>No specific rules for collective cases</p>

<b>Costs (Para. 13)</b>	<b>Lawyers' Fees (Para. 29-30)</b>	<b>Prohibition of punitive damages (Para. 31)</b>	<b>Collective Follow- on actions (Para 33-34)</b>	<b>Interplay between injunctions and compensation across all sectors</b>
The 'loser pays' principle applies	Lawyers' fees do not incentivise unnecessary litigation	Yes	n/a	No damages claims

SPAIN				
<p><b>Scope</b></p> <p>The Code of Civil Procedure provides some rules on collective redress which are considered to be of general application. However, there is no specific horizontal or general collective redress mechanism. Rules on parties having standing are sectoral only.</p> <p>Mechanism only applies in consumer; competition; discrimination ; environmental and labour law</p> <p>Joinder of actions under the regular civil procedure</p> <p>Compensatory and injunctive relief.</p> <p><b><u>Problems/ Incompatibilities with Recommendation</u></b></p>	<p><b>Standing</b> (Para. 4-7)</p> <p><b>Consumer law:</b> legally constituted consumer and users associations, authorised public entities, Public Prosecution Service.</p> <p><b>Competition law:</b> legally constituted consumer and users associations. Depending on the type of claim associations, professional corporations or representatives of economic interests may have standing where their members are affected.</p> <p><b>Anti-discrimination:</b> Trade unions and other legally constituted associations whose primary goal is the defence of equal treatment of men and women. Public bodies</p> <p><b>Labour Law:</b> Trade</p>	<p><b>Admissibility</b> (Para. 8-9)</p> <p>No early determination of admissibility questions.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>The admissibility phase usually takes at least two years, ultimately excessively extending the duration of the collective redress proceedings (over a period of seven years in Spain to reach a first instance judgment).</p>	<p><b>Information on Collective Redress</b> (Para. 10-12, 35-37)</p> <p>Rules on dissemination of information are stipulated in the Code of Civil Procedure.</p> <p>Law firms and consumer associations publicise potential claims.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>There is currently no National Registry on collective redress.</p>	<p><b>Funding</b> (Para. 14-16)</p> <p>Third party funding is permitted but rarely used in practice since organisations are prohibited from making a profit.</p> <p>There are a number of transparency requirements imposed on claimants to avoid abusive litigation. For instance, consumer associations are not permitted to make a profit.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>There is no obligation on a claimant to disclose their source of funding at the outset of a case</p> <p>There is no regulation of third party funding by the court or otherwise. However, this not</p>

<p><b><u>principles</u></b></p> <p>Collective redress rules are spread across numerous different laws and as a result are neither cohesive nor systematic.</p>	<p>unions</p>			<p>necessarily seen as a problem as third-party funding is so uncommon and representatives are not permitted to make a profit.</p>
<p><b>Cross Border Cases</b> (Para. 17-18)</p> <p>Foreign claimants can participate in collective proceedings. There not been any cases involving foreign parties to date.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Practitioners involved in cross-border collective actions found the injunctive procedure very difficult, citing in particular the higher costs.</p>	<p><b>Expedient procedures for injunctive orders</b> (Para. 19)</p> <p>Article 727.7 CCP provides for a provisional injunction ordering a defendant to cease an activity. This may be granted prior to the commencement of proceedings and in exceptional urgency may be granted on an <i>ex parte</i> basis.</p> <p><b><u>Competition</u></b></p> <p>In competition cases an interim prohibitory order can be obtained from the CNMC.</p>	<p><b>Efficient enforcement of injunctive orders</b> (Para. 20)</p> <p>Legislation provides for a fine of between 60,000 and 600,000 per day for failure to comply with an order or injunction.</p>	<p><b>Opt In/Opt Out</b> (Para. 21-24)</p> <p>There is no express rule. However, recent case law suggests that the system should be interpreted as an opt-in model due to its compatibility with non-party claimants bringing independent actions.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Lack of clear rules leads to uncertainty regarding the <i>res judicata</i> effect of decisions in collective cases.</p>	<p><b>Collective ADR and Settlements</b> (Para. 25-28)</p> <p>During the preliminary hearing, before the trial the parties are informed of the possibility of resolving the dispute by negotiation and the hearing is conducted in such a way as to attempt to reach an agreement between the parties.</p>
<p><b>Costs</b> (Para. 13)</p> <p>The loser pays principle</p>	<p><b>Lawyers' Fees</b> (Para. 29-30)</p>	<p><b>Prohibition of punitive damages</b> (Para. 31)</p>	<p><b>Collective Follow- on actions</b> (Para 33-34)</p>	<p><b>Interplay between injunctions and compensation across</b></p>

<p>applies.</p>	<p>Contingency fees are available.</p> <p>Fees cannot exceed more than one third of the total amount of the claim.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>The courts do not exercise any supervision over funding agreements.</p>	<p>Extra-compensatory damages are not available.</p>	<p>Follow on actions are possible in competition law cases. There is a limitation period of 1 year for bringing any claims starting from the date of the binding decision confirming the infringement.</p>	<p><b>all sectors</b></p> <p>It is possible to claim damages and an injunction in one action.</p> <p>An injunction may be relied upon in a separate, collective, action. However, this has never been successfully pursued in practice.</p>
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<b>SWEDEN</b>				
<p><b>Scope</b></p> <p>General mechanism under the Group Proceedings Act</p> <p>There is a specific collective ADR mechanism in consumer cases.</p> <p>Both compensatory and injunctive relief is available.</p>	<p><b>Standing</b> (Para. 4-7)</p> <p><b>General</b></p> <p>Representative claimants can be:</p> <ul style="list-style-type: none"> <li>- Government organisations</li> <li>- Individual members of a group affected</li> <li>- non-profit making organisations representing groups concerned.</li> </ul> <p><b>Consumer</b></p> <p>Consumer Ombudsman or a group of individuals if the ombudsman has declined to act.</p>	<p><b>Admissibility</b> (Para. 8-9)</p> <p>No early determination of admissibility questions, admissibility decided under the ordinary procedural rules.</p>	<p><b>Information on Collective Redress</b> (Para. 10-12, 35-37)</p> <p>The court has a wide discretion as to how to order the dissemination of information and may order one of the parties to take certain steps. Any extra costs incurred by a party will be met from public funds</p> <p><b>Problems/ Incompatibilities with Recommendation principles</b></p> <p>Too few cases for a national registry.</p>	<p><b>Funding</b> (Para. 14-16)</p> <p>In most cases the representative claimant is expected to receive some financial support from outside sources, including third parties and public funds.</p> <p><b>Problems/ Incompatibilities with Recommendation principles</b></p> <p>There is no specific regulation of third party funding. The court will consider the adequacy of the representative's funding at the admissibility stage.</p>
<p><b>Cross Border Cases</b> (Para. 17-18)</p> <p>There are no specific rules or limitations as to the participation of foreign claimants.</p>	<p><b>Expedient procedures for injunctive orders</b> (Para. 19)</p> <p><b>General</b></p> <p>The court may grant an injunction on an interim basis in order to safeguard the claimant's rights.</p>	<p><b>Efficient enforcement of injunctive orders</b> (Para. 20)</p> <p>There is currently no group enforcement procedure and enforcement is carried out by the individual claimants under standard enforcement</p>	<p><b>Opt In/Opt Out</b> (Para. 21-24)</p> <p><b>General</b></p> <p>Opt-in only.</p> <p>The claimant must identify the group members in their original application. The members will then</p>	<p><b>Collective ADR and Settlements</b> (Para. 25-28)</p> <p>No specific rules in collective redress cases.</p> <p>There is the possibility for a court directed settlement or an out of court settlement following ordinary</p>



	<p><b><u>Consumer</u></b></p> <p>Under the consumer law regime the Consumer Ombudsman may issue a prohibition order.</p> <p>The average duration of a complaint to the National Board of Consumer Disputes is 85 days</p> <p><b><u>Competition Law</u></b></p> <p>The Swedish Competition Authority has the power to issue prohibition orders.</p>	<p>rules.</p> <p>The court can impose fines on a noncompliant party.</p>	<p>receive a notification and have a window specified by the court to indicate whether they wish to participate. Those who do not reply are deemed to have withdrawn.</p> <p><b><u>Consumer</u></b></p> <p>Opt-out only</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>The procedure does not enable potential group members to opt in up until judgment.</p>	<p>procedural rules</p>
<p><b>Costs (Para. 13)</b></p> <p><b><u>General</u></b></p> <p>The loser pays principle applies.</p> <p>Group members are not, in principle, liable for litigation costs where</p>	<p><b>Lawyers' Fees (Para. 29-30)</b></p> <p>Contingency fees are in principle allowed. Claimants and lawyers may enter into a risk agreement under which the lawyer receives</p>	<p><b>Prohibition of punitive damages (Para. 31)</b></p> <p>Punitive damages are not available</p>	<p><b>Collective Follow- on actions (Para 33-34)</b></p> <p>It is possible to bring a collective follow-on proceeding. However, these are very uncommon.</p>	<p><b>Interplay between injunctions and compensation across all sectors</b></p> <p>It is possible to obtain both an injunction and damages in the same action.</p>

the losing defendant is unable to pay.  <b><u>Consumer</u></b>  No costs forum	more compensation if successful. Such agreements are subject to the approval of the court.			
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UNITED KINGDOM				
Scope	Standing (Para. 4-7)	Admissibility (Para. 8-9)	Information on Collective Redress (Para. 10-12, 35-37)	Funding (Para. 14-16)
<p>The generally available collective compensatory procedures are: group litigation orders (GLO), representative actions (under CPR 19.6) and test cases</p> <p>For sector specific mechanisms:</p> <p>The Competition Act 1998 s 47B-E provides an alternative means of collective redress for claimants to bring collective claims in competition cases. Remedy: compensation and/or an injunction</p> <p>The 2015 Consumer Rights Act broadened the scope of redress available to consumer enforcers to include compensation and not solely injunctive relief.</p>	<p>There are no special rules on standing to bring a compensatory collective redress action under general collective redress mechanisms in England — normal legal capacity is sufficient.</p> <p><b>Competition mechanism:</b> it must be “just and reasonable” for the applicant to act as a class representative in the collective proceedings. The tribunal must consider whether the proposed representative would in all the circumstances fairly and adequately act in the interests of class members</p> <p><b>Consumer mechanism:</b> only those public bodies either set out in the Enterprise Act itself (the OFT, Trading Standards Offices - run</p>	<p>Admissibility is decided at the earliest stage of the proceedings.</p> <p><b>Representative actions:</b> it is open to the court, either on its own motion or on the application of any person with an interest, to direct either that the claim should not be continued as a representative claim at all, or that the representative should be replaced with an alternative.</p> <p><b>Competition mechanism:</b> the tribunal determines the eligibility of the claim based on three requirements: - the claims must be brought on behalf of an identifiable class of persons;</p>	<p>Various privately-run websites offer information on collective redress</p> <p>The national GLO list can be accessed at <a href="https://www.gov.uk/guidance/group-litigation-orders">https://www.gov.uk/guidance/group-litigation-orders</a></p> <p>Information in applications for competition CPOs is on the CAT website: <a href="http://www.catribunal.org.uk">http://www.catribunal.org.uk</a></p> <p><b>Problems/ Incompatibilities with Recommendation principles</b></p> <p>No national registry</p>	<p>Funding for collective redress claims comes from private sources — either litigation funders or the law firms which are representing the claimants.</p> <p>Civil legal aid from government sources has all but disappeared in the UK in recent years.</p> <p><b>Problems/ Incompatibilities with Recommendation principles</b></p> <p>Most larger collective claims are funded by a third party and/or law firm in some way. There is no legislative or public administrative control of funders in the UK.</p> <p>However, at common law, anyone who improperly funds the litigation of another may</p>

	<p>by local authorities - and certain public consumer protection or regulatory bodies) or a private body designated by the minister may apply. To date the only non-public body to be designated is the Consumers' Association (Which?).</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>There is no requirement that the representative in representative proceedings (CPR 19.6) should have a non-profit motive.</p>	<p>- the claims to be included in the proceedings must raise "common issues"; and  - the claims must be "suitable" to be brought in collective proceedings.</p>		<p>be found liable for all of the (adverse) costs of that litigation if the case is lost.</p>
<p><b>Cross Border Cases</b> (Para. 17-18)</p> <p>There are no rules preventing claimants residing outside the UK from joining a GLO.</p> <p><b><u>Competition mechanism:</u></b> any victim of a competition law infringement may opt-in to a UK collective</p>	<p><b>Expedient procedures for injunctive orders</b> (Para. 19)</p> <p>The court can make an interim injunctive or declaratory order at any time – even before a claim has been commenced – in cases of urgency or where it would be in the interests of justice to do so.</p>	<p><b>Efficient enforcement of injunctive orders</b> (Para. 20)</p> <p>Refusal to comply with an injunction or similar order – which is endorsed with a 'penal notice' (a warning that non-compliance is a criminal offence) – may be enforced through contempt of court</p>	<p><b>Opt In/Opt Out</b> (Para. 21-24)</p> <p>The general compensatory collective redress mechanisms in the UK are opt-in only, with the exception of representative actions. An order or judgment in a representative action is binding on all persons represented, even if</p>	<p><b>Collective ADR and Settlements</b> (Para. 25-28)</p> <p>The court is entitled to 'encourage' parties to use ADR (CPR rule 1.4(2)(e)) and may impose sanctions on them in costs if they unreasonably fail to do so.  Pre-action conduct</p>

<p>competition proceeding regardless of nationality or residence. However, an opt-out CPO order will only bind those class members who have not opted out and who are domiciled in the UK at the time set out in the order. However, even in an opt-out proceeding, non-UK residents may nevertheless decide to opt in.</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Consumer mechanism: foreign claimants have no standing to bring an application as they are not specified in the Act, nor have any non-UK bodies been designated by the Minister.</p>		<p>proceedings. A court may make an order committing the defaulter to prison or may impose a lesser sanction – a fine or sequestration of goods, for example.</p>	<p>they were not parties to the proceedings and even if they were unaware that the proceedings were underway.</p> <p>Competition mechanism: the collective proceedings order allows both an 'opt-in' and on an 'opt-out' system, at the discretion of the Tribunal. Opt-in is the starting point with opt-out being made available if necessary in the interests of justice.</p>	<p>requires parties to consider ADR.</p> <p>Competition mechanism: The tribunal may refuse to make a CPO if it thinks that the dispute could better be resolved using a form of ADR.</p>
<p><b>Costs</b> (Para. 13)</p> <p>The 'loser pays' principle applies however, the court may make a different order if the</p>	<p><b>Lawyers' Fees</b> (Para. 29-30)</p> <p>In England, contingency fees are permitted, but subject to some</p>	<p><b>Prohibition of punitive damages</b> (Para. 31)</p> <p>Punitive (exemplary) damages are only</p>	<p><b>Collective Follow- on actions</b> (Para 33-34)</p> <p>It is not a pre-requisite for a competition claim that a public authority</p>	<p><b>Interplay between injunctions and compensation across all sectors</b></p> <p>Both injunctions and</p>

<p>loser was partly successful, the conduct of one or the other of the parties was unreasonable or where an offer to settle was made which was rejected but could have dealt with the claim earlier.</p> <p>In cases under £10m in value parties are required to complete a costs budget which will be approved by the court. Recoverable costs are then limited to those set out in each party's budget.</p> <p>To attempt to keep costs predictable and proportionate in GLO cases, courts have sometimes applied costs caps to the amount parties may recover in costs if they win.</p> <p>Where a party has entered into a conditional fee agreement it will be unable to recover the</p>	<p>limitations:</p> <ul style="list-style-type: none"> <li>- subject to a cap of 50% of recoveries.</li> <li>- the DBA agreement must be in writing and there are ethical rules for lawyers requiring them to explain carefully to their clients the effect of the DBA</li> </ul> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>The court does not review and approve conditional fee agreements. However, a client may apply to have the reasonableness of his solicitor's costs assessed.</p>	<p>available in England and Wales in very rare circumstances. The defendant must have known he was acting unlawfully and continued with the conduct in the expectation that his gain from the unlawful act would exceed any compensation which could be awarded to the claimants. Exemplary damages have not been awarded in collective redress actions.</p> <p>Not available for competition mechanism</p> <p><b><u>Problems/ Incompatibilities with Recommendation principles</u></b></p> <p>Punitive damages available</p>	<p>should have first made an infringement decision, although both of the applications made (to mid-2017) have followed on from a competition authority decision.</p>	<p>compensation are available under the collective redress mechanisms.</p>
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success fee element from the losing party.				
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# COUNTRY REPORTS

## AUSTRIA - FACTSHEET

### Scope

In Austria, there is no horizontal mechanism tailored to collective redress. For compensatory actions, traditional devices of multi-party procedures are available: joinder, consolidation of cases, test cases and assignment of claims.

Practice developed the 'Austrian model of group litigation' to handle mass damages claims: a combination of either a joinder of claims or a mass assignment of claims to an association backed up by litigation finance. The procedure has been created for monetary damages in the investment sector but is not limited to a specific sector.

Injunctions can be brought by specified entities in specific sectors such as consumer protection.

### **Problems/Incompatibilities with Recommendation principles**

Lack of a formal collective redress mechanism.

The 'Austrian model of group litigation' is suited to solve some of the problems arising from traditional multi-party practice, but not all of them.

### Standing

No special provisions on standing for compensatory claims. In practice, the Consumer Association (Verein für Konsumenteninformation) and the Employees' Chambers (Arbeiterkammern) bring actions under the 'Austrian model of group litigation' focussing on compensatory collective redress. However, other associations would be entitled to do so as well, if claims are transferred to them.

For injunctive claims, standing is granted to entities defined by law.

### **Problems/Incompatibilities with Recommendation principles**

No specific provisions or restrictions as to standing for compensatory claims.

### Admissibility

Early determination of admissibility questions by the courts (if the claims are based on substantially the same cause of action and concern substantially similar questions of law and fact).

### Information on Collective Redress

Associations assisting claimants under the 'Austrian model of class action' regularly publish information on currently pending mass litigations (e.g. on their homepage, via newspapers, etc).

### **Problems/Incompatibilities with Recommendation principles**

No official channel for the distribution of information on collective redress nor a national registry.

### Funding



Commercial litigation finance is regularly used to enable the 'Austrian model of group litigation'. Since litigation-funding agreements are not normally divulged, no exact figures as to the frequency of the use of litigation finance are available.

### **Problems/Incompatibilities with Recommendation principles**

Third party funding is not specifically regulated and there are no formalised control mechanisms.

### **Efficient procedures for injunctive orders**

Expedient procedures for Injunctions in specific sectors such as consumer protection.

For compensatory redress, injunctions according to general rules may be issued as far as necessary to secure the claim.

### **Efficient enforcement of injunctive orders**

Yes.

Enforcement of collective actions and settlements are subject to ordinary enforcement via execution proceedings.

### **Opt In/Opt Out**

Austrian civil procedure strictly follows the opt-in approach. The same applies to the 'Austrian model of group litigation'.

### **Collective ADR and Settlements**

Court-directed settlements may be concluded for the duration of proceedings, in special cases (proceedings at district court level) also out of court before an action is brought.

In the preparatory hearing, the judge is under a duty to suggest a respective court-directed settlement. Both court-directed and out of court settlements are, in general, subject to some degree of judicial control.

### **Problems/Incompatibilities with Recommendation principles**

No specific rules for collective redress as there is no horizontal CR mechanism.

### **Costs**

Austria applies the "loser pays" principle. There are, however, some exceptions to this general rule, usually applying when the winning party has culpably caused the occurrence of costs that would have not been necessary.

### **Lawyers' Fees**

Lawyers' fees are usually either calculated based on the statutorily provided attorney rates or by individual agreement (usually fixed hourly rates).

Contingency fees agreed upon between claimants and their attorneys are invalid. However, performance-based fees are possible. It is, for example, possible to agree upon a certain fixed sum payable in case of successful litigation, if there is also a fixed sum stipulated in case of unsuccessful litigation and the two sums are not grossly disproportionate.

### **Prohibition of punitive damages**

Punitive/extra-compensatory damages are not available.

### **Interplay between injunctions and compensation across all sectors**

The 'Austrian model of group litigation' procedure is almost exclusively available for monetary damages and does not usually follow prior injunctive proceedings. Generally it is possible to rely on an injunctive order in a subsequent damages action.

# AUSTRIA - REPORT

## I. Traditional multiparty practice

### 1. General description

In Austria, there are no special rules regarding collective redress. There are, however, several traditional devices of procedural law that can, at least to a certain extent, be used for mass litigations.

#### a. Individual actions

Obviously, it is possible for claimants to pursue their claims by way of individual actions before the same court or different courts. This, however, usually leads to the undesirable duplication of lawsuits and, possibly, to inconsistent results. This possibility has, nevertheless, been used by some claimants in mass tort claims.

#### b. Joinder

There are several devices of traditional civil procedure that allow for a joinder of claimants or claims. First, several claimants may join in a single proceeding.<sup>32</sup> Second, one claimant may bring several claims against one or more defendants in one action. By using these procedural means, it is possible for several claimants to join forces against one or more defendants. These procedural devices are of major practical importance. Joinder was used in a number of mass cases with up to several hundred claimants joining in a single complaint.

#### c. Consolidation of cases

In addition to joinder, the court may consolidate cases if this serves the interest of justice.<sup>33</sup> In general, this is only permissible in case the actions are pending before the same court. There is one exception to this general rule; in certain tort cases, the court can transfer a case to another court where similar cases are pending for the purposes of consolidation.<sup>34</sup> From a practical point of view, consolidation is of limited use in mass litigation. This is due to the fact that consolidation may be impractical if several individual actions are filed at different times. In addition, there are frequently practical problems arising from the large number of lawyers involved and the different trial strategies that would most likely be pursued by them.

#### d. Test cases

In some cases, potential claimants and defendants conclude an agreement according to which only one case is filed, designed to resolve a number of similar controversies. Alternatively, the parties may agree to await the outcome of an already pending case (both approaches are being referred to as "test case"). In these cases, the potential defendant usually waives the statute of limitations for the time as the test case is pending. Regularly, there

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<sup>32</sup> § 227 *Zivilprozessordnung* (Code of Civil Procedure).

<sup>33</sup> § 187 *Zivilprozessordnung* (Code of Civil Procedure).

<sup>34</sup> § 31a paragraph 2 *Zivilprozessordnung* (Code of Civil Procedure).

is an understanding between the parties that the result of the test case is binding for the other claims.

## **2. Scope/Type**

The mechanisms mentioned above (unless otherwise stated) are horizontal in the sense that they are not restricted to a particular area of the law. In general, both injunctive and compensatory claims are possible. In practice, mass claims are mostly found in tort cases and in cases for damages in connection with false investment advice.

## **3. Procedural Framework**

The above-mentioned mechanisms fit into traditional civil procedure, either by combining several parties or several lawsuits. Technically, there are different forms of joinder, joinder of claims and joinder of parties. Joinder of parties requires that there is some form of connection between the parties joined. Specifically, section 11 subparagraph 2 Austrian Code of Civil Procedure requires that the claims are based on essentially the same facts, and that the court has jurisdiction over all defendants. On the other hand, a single plaintiff can pursue several claims in one complaint (joinder of claims). In this case, the statute does not require that there is a particular connection between the claims brought. This device, provided for in section 227 of the Austrian Code of Civil Procedure, is the basis for the 'Austrian model of class action' in which several claimants assign their claims to an association which then brings the claims in its own name. Thus, in this case, there is technically only one claimant bringing several claims. Nonetheless, it has been suggested that the requirements for joinder of parties should be applied to this situation as well. The Austrian Supreme Court has taken a middle ground position, requiring that the claims have "essentially a common core" and are based on "essentially the same questions of fact or law".<sup>35</sup>

The scope of res judicata of the procedures is limited to the parties who actually participated in the proceeding. Other potential members of the respective group who did not take part in the proceeding are, therefore, not bound by the outcome.

With regard to specific procedural rules, please refer to the description in chapter II. 8. below.

### **a. Competent Court**

There are no special rules on jurisdiction for this type of proceedings. Consequently, ordinary rules on jurisdiction apply. Therefore, these types of proceeding can be brought before any Austrian court. Given the nature of most claims, the majority of cases are brought before the commercial courts.

### **b. Standing**

There are no restrictions as to whom the procedures outlined above are available.

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<sup>35</sup> Austrian Supreme Court 4 Ob 116/05w JBI 2006, 48.

### **c. Availability of Cross Border collective redress**

There are no specific rules on Cross Border collective redress. Consequently, there are also no restrictions as to the participation of foreign claimants. General rules regarding the participation of foreign claimants apply (e.g. regarding process capability, jurisdiction, etc).

### **d. Opt In/Opt Out**

As the abovementioned procedures are part of traditional civil procedure, active participation in the form of an action is required. Therefore, the procedures apply only to those who have taken steps to join the proceedings (opt-in model). There are also no specific measures relating to the fact that affected persons may be not identifiable.

### **e. Main procedural rules**

#### **Admissibility and Certification criteria**

No special admissibility and certification criteria apply.

#### **Single or Multi-stage process**

The procedure is a single-stage process; general rules of civil procedure apply.

#### **Case-management and deadlines**

There are special rules on case management or deadlines.

#### **Expediency**

Generally, Austrian courts work quite quickly. Thus, in 2012, the average duration (calculated as the median) of civil proceedings was 6 months before the District Courts (Bezirksgerichte) and 12.2 months before the Regional Courts (Landesgerichte).<sup>36</sup> Roughly 50 percent of cases were resolved after less than six months. Only two percent of all proceedings lasted longer than three years.

#### **Evidence/discovery rules**

Austrian civil procedure law does not contain any discovery rules as provided by the US-type class action. General rules for taking evidence apply.

In a recent decision (1 Ob 39/15i), the Austrian Supreme Court has ruled that claimants may also present indirect evidence (practically most relevant are files and records from administrative proceedings against the defendant) to the court; this does not constitute a violation of the principle of immediateness of taking evidence (*Unmittelbarkeitsgrundsatz*). Defendants are, however, entitled to apply that the direct evidence may be examined by the court. This decision is particularly important for capital market claims of investors, due to the fact that most internal processes within the defendant party (e.g. market manipulations) are usually not easy to prove.

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See [https://www.justiz.gv.at/web2013/home/justiz/daten\\_und\\_fakten/verfahrensdauer~8ab4a8a422985de30122a93207ad63cc.de.html](https://www.justiz.gv.at/web2013/home/justiz/daten_und_fakten/verfahrensdauer~8ab4a8a422985de30122a93207ad63cc.de.html).

## **Interim measures**

In this regard, please refer to the chapter on injunctions (II. 9. e.) below.

## **Court-directed settlements and out of court settlements**

Court-directed settlements may be concluded during the whole proceeding, in special cases (proceedings at district court level) even before an action is brought (so-called *Prätorischer Vergleich*). In the preparatory hearing (*vorbereitende Tagsatzung*), the judge is under a duty (§ 258 para 1 number 4 Code of Civil Procedure) to suggest a respective court-directed settlement. Both court-directed and out of court settlements are, in general, subject to some degree of judicial control. However, this is limited to illegality or a violation of good morals. The judge cannot refuse a settlement on the ground that it is not in the best interest of the parties.

## **4. Available remedies**

### **a. Type of damages**

Since all of the measures described above fit into the framework of traditional civil procedure, there are no restrictions as to the available remedies. In most actions, claimants ask for money, although a declaratory judgment would be possible as well.

### **b. Allocation of damages/distribution methods**

Despite the use of the above-mentioned procedural means, the respective actions usually remain legally independent in the sense that compensation is not awarded to the group as a whole, but to the individual claimants according to their respective entitlement. Therefore, no specific method for the allocation or distribution of damages is needed. Generally, the distribution is governed according to the respective legal relationship of the group members.

### **c. Availability of punitive/extra-compensatory damages**

No reward of punitive/extra-compensatory damages is available.

### **d. Skimming-off/restitution of profits**

As far as the profits obtained from a mass harm situation are legally deemed a damage (which will usually be the case), they have to be restituted by means of general tort law. However, there is no procedural device for skimming off profits in a civil proceeding without the initiative of the parties affected by the illegal activity. Since, in case of 'atomized losses', there is typically no incentive for the parties suffering the loss to bring an action,<sup>37</sup> skimming off of illegal profits occurs only rarely.

In case of criminal actions, illegally obtained profits may also be confiscated by the criminal court (§ 20 et seq Criminal Code). The same applies to profit illegally obtained by cartel members (§ 20 Antitrust Law).

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<sup>37</sup> Kodek, *Atomised Losses in Tort Law: Conceptual Difficulties and Modern Developments*, *Journal of European Tort Law* 2015, 109.

### **e. Injunctions**

In case the respective statutory requirements are met (in general: prima facie evidence of claim and endangerment thereof, additional requirements may be required depending on the nature of the respective claim), claimants may obtain an injunction (§ 378 et seq Execution Order). This injunction may either be applied for in the same action as the (compensation) claim itself, or via two separate actions (first injunction, then ordinary civil procedure).

### **f. Limitation periods**

There are no special rules on limitation periods, i.e. general rules apply. In cases where no specific rule exists, claims become time-barred after 30 years. There are, however, numerous exceptions to this general rule, the most important of which concerns tort claims. There, a so-called subjective test is applied. Claims become time-barred three years after the claimant gained knowledge of the damage and the liable party, at the latest, however, 30 years after the damage occurred. The thirty year-period also applies if the claim arises from crimes committed intentionally and carrying a penalty of one year imprisonment or more.

## **5. Costs**

Austria has a "loser pays" rule. There are, however, some exceptions to this general rule, usually applying when the winning party has culpably caused the occurrence of costs that would have not been necessary (e.g. due to delayed submission of statements or evidence, unnecessary procedural steps).

## **6. Lawyers' Fees**

Lawyers' fees are usually either calculated based on the statutorily provided attorney rates or by individual agreement (usually fixed hourly rates). Contingency fees agreed upon between claimants and their attorneys are invalid (§ 879 para 2 number 2 General Civil Code). In contrast to contingency fees, performance-based fees are largely considered permissible. It is, for example, possible to agree upon a certain fixed sum payable in case of successful litigation, if there is also a fixed sum stipulated in case of unsuccessful litigation and the two sums are not grossly disproportionate (e.g. 7 Ob 8/06 m).

## **7. Funding and commercial litigation**

In recent years, commercial litigation finance became increasingly important. However, as a practical matter, commercial litigation finance is only available to relatively high claims. The respective "threshold" is about 50,000 EUR. It is one of the major advantages of the 'Austrian model' of group litigation (for further details, see chapter III. below).

Funding agreements between claimants and process financiers are currently not subject to judicial control within the financed proceeding, as stipulated by the Commission's Recommendations (para 14 et seq; for further details, see chapter III. 9. below). Separate judicial control (i.e. in a litigation between the claimant and the process financier) is obviously possible.

In academic literature, it is contested whether the prohibition of contingency fees for attorneys (see chapter II. 12. above) also applies to commercial litigation financiers. The Austrian Supreme Court has, as of yet, not settled this dispute. In 6 Ob 224/12b, the Court has (only) ruled that the defendant of the financed action does not have standing to dispute a contingency fee arrangement between a claimant and a litigation finance company. The prevailing view seems to be that the current system of litigation funding is permissible.

## **8. Enforcement of collective actions and settlements**

As regards multi-party claims and settlements, no specific rules regarding their enforcement exist. They are subject to ordinary enforcement via execution proceedings.

## **9. Number and types of cases brought/pending**

As the procedural means described above are part of ordinary civil procedure, there exists no separate official coverage as to the numbers of cases brought forth. The practical relevance of these procedural means is, however, significant. Most of the actions brought forth concern compensatory tort claims (e.g. actions for unsuitable investment advice). Injunctive actions are possible, but practically make up only a minority of cases.

## **10. Impact of the Recommendation/Problems and Critiques**

In this regard, please refer to the joint assessment regarding the current Austrian framework and its compliance with the Commissions recommendations, as provided in chapter III. 15. et seq below.

# **II. General Collective Redress Mechanism: the 'Austrian model' of group litigation**

## **1. General description**

Due to the lack of a formal collective redress mechanism, legal practice in Austria developed a special form of group litigation that may be used in addition to the traditional devices described in chapter II. above.<sup>38</sup> This form of group litigation is based on a combination of joinder of claims and litigation finance and is referred to as the 'Austrian model of group litigation' (*Österreichisches Modell der Sammelklage*). Here, potential claimants assign their claims to an association (typically a consumer association). In a second step, the association brings action on its own behalf. Under this scheme, it is possible to assemble large numbers of claimants, thereby allowing the association to use commercial litigation finance. This is advantageous for the claimant because the claim can be pursued without any cost risks.

In practice, the 'Austrian model of group litigation' is of particular relevance and has been successfully used in several mass cases (e.g. against banks for charging excessive interest rates on loans). The largest mass litigation in

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<sup>38</sup> Klauser 2002 805; Kodek 2004 615.



Austria (concerning a securities case involving more than 3,000 claimants) also used this scheme. In recent years, the 'Austrian model of group litigation' was predominantly used in damages actions for unsuitable investment advice. As of 2012, approximately 20,000 claims were pending before the Vienna Commercial Court and the Vienna District Commercial Court; half of them have been brought by way of the 'Austrian model of group litigation'.

## **2. Scope/Type**

The potential scope of the 'Austrian model of group litigation' is not limited to any specific area of the law. It has to be noted, however, that this device is usually limited to money claims, since, under Austrian case law, claims for declaratory judgments ordinarily cannot be assigned (which would be possible for the application of the 'Austrian model of group litigation').

## **3. Procedural Framework**

The 'Austrian model of group litigation' fits into the traditional practice of Austrian civil procedure. The association to which the claims have been assigned to appears in the proceeding as a single claimant. Therefore, ordinary rules of civil procedure apply.

In such cases, courts regularly decide on one or a few claims by way of a partial judgment. This allows the appellate courts to review the relevant questions of fact and law. After a respective judgment issued by the appellate court, the remaining claims are typically settled out of court by the parties. In case there is no such settlement, a decision of these claims would be relatively easy for the courts, as the relevant questions have already been settled by the appellate decision.

Austrian civil procedure strictly follows the opt-in model (see also chapter III. 7. below). Therefore, the scope of *res judicata* is limited to the parties who actually participated. The outcome of the proceedings is consequently not binding for other members of the respective group. There are also no specific measures relating to the fact that affected persons may be not identifiable.

## **4. Competent Court**

With regard to the above-mentioned procedural devices, no special rules on jurisdictions exist. Therefore, general rules apply. As a consequence, this type of proceeding could in general be brought before any Austrian court. Given the nature of most claims, most of the respective proceedings are pending before the Vienna Commercial District Court (in case the highest single claim brought does not exceed EUR 15,000) or the Vienna Commercial Court for all other claims.

## **5. Standing**

The 'Austrian model of group litigation' is characterized by a 'collectivization' of claims by way of assignment to an association or other institution. Practically, only the Consumer Information Association (*Verein für Konsumenteninformation*) and the Employees' Chambers (*Arbeiterkammern*) bring forth such actions. However, also other institutions, such as the

Chamber of Commerce, would be entitled to do so as well. In case the aforementioned organisations appear as claimants, special rules have to be observed for the appellate proceedings. In general, all restrictions of remedies based on the amount in controversy (which, in other cases, potentially restrict the grounds that can be raised on appeal to the Court of Appeals and which could bar access to the Austrian Supreme Court altogether), do not apply if these organisations appear as claimants.

Other than that, there are no special provisions (restrictions) on standing. Therefore, any other association is entitled to pursue claims that have been assigned to it. In scholarly literature, it has been suggested that a special limited liability company could be set up to serve as a vehicle for the 'Austrian model of group litigation'. It seems, however, that this approach has not been used in practice so far. Recently, an association ('COBIN - Consumers-Business-Investors')<sup>39</sup> was founded, aimed at supporting collective redress litigations, particularly by raising respective funds and organizing and carrying out mass litigations under the 'Austrian model of group litigation'. COBIN plans to organize and finance first mass litigations as of fall 2017.

In the latter cases, the special rules for appellate proceedings mentioned above do not apply. Thus, a mass case brought by a 'normal' association or other body is simply governed by ordinary rules of civil procedure.

There are no restrictions as to the persons entitled to assign their claims to an institution. As a practical matter, however, participation in such a proceeding requires that an association is willing to take up one's claim, though it seems that so far this has not created any particular difficulties.

## **6. Availability of Cross-Border collective redress**

The procedure is not restricted to Austrian claimants. Foreign claimants are free to participate. There are no procedural peculiarities if this mechanism is used in cross-border cases. Since the procedure requires that all claimants actively take part and assign their claims to an association, jurisdiction over the members of the group (which may be problematic in an opt-out type procedure) is not an issue.

However, it should be noted that the CJEU has held that the rules on jurisdiction for consumer cases under the Brussels I Regulation do not apply any more if a consumer assigns his claim to an association.<sup>40</sup> In 1993, the Court held that a plaintiff (now claimant) acting in pursuance of his trade or professional activity, and who is not, therefore, himself a consumer party to one of the contracts listed in Article 15 Brussels I Regulation, may not enjoy the benefit of the rules of special jurisdiction laid down by the Convention (now Regulation) concerning consumer contracts.<sup>41</sup> The rationale for this decision is that a consumer association is less worthy of special protection than an individual consumer.

In 2016, the Austrian Supreme Court requested a preliminary ruling from the Court of Justice of the European Union concerning the question whether a claimant to whom other consumers assigned their claims can invoke the

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<sup>39</sup> <https://www.cobinclaims.at/>

<sup>40</sup> ECJ, Judgment 1 October 2002. - *Verein für Konsumenteninformation v Karl Heinz Henkel*, - Case C-167/00; Austrian Supreme Court 4 march 2005, 9 Nc 4/05w.

<sup>41</sup> ECJ, Judgment of 19 January 1993, *Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH*.

jurisdiction under Article 15 Brussels I Regulation 2001 (which is available only to consumers), if he – in connection with the enforcement of his alleged claims against Facebook – publishes books, gives paid lectures, operates webpages, raises donations and organizes an action under the 'Austrian model of class action'. For further details, please refer to the case summary in chapter VI. below.

## **7. Opt In/Opt Out**

Austrian civil procedure strictly follows the opt-in approach. The same applies to the 'Austrian model of group litigation'. The claimant has to assign his claim to an association or other institution. Therefore, the procedure only applies if an active step was taken in order to join the proceedings. Also with regard to the Austrian model of group litigation, there are no specific measures relating to the fact that affected persons are not identifiable.

## **8. Main procedural rules**

### **a. Admissibility and certification criteria**

The 'Austrian model of group litigation' is not subject to any certification process in the technical sense of the term. The first actions that were filed under this scheme were vigorously challenged by the defendants. For example, in some investor claims cases, it took three years until the Austrian Supreme Court decided that the procedure was admissible and that the defendant did not have standing to challenge a claimant's use of commercial litigation finance.

The Austrian Supreme Court, however, imposed a requirement that raising several claims in one action is only permissible if the claims are based on substantially the same cause of action and concerned substantially similar questions of law and fact.<sup>42</sup> In practice, this requirement does not constitute any significant restrictions, due to the fact that no reasonable claimant would bring totally unrelated claims in one proceeding.

A common defence strategy of defendants in unsuitable investment advice cases is to argue that the claims should not be joined in a group action since the advice given to the various members of the group has to be assessed on an individual basis, therefore not being suitable to disposition in a group proceeding. In the most prominent case, claimants successfully overcame this objection by arguing that the defendant had employed a systematic, general scheme of unsuitable advice in order to promote a specific product.

### **b. Single or Multi-stage process**

The procedure is a single-stage process. Since the Austrian model of group litigation is characterized by all claims being assigned to a single association which then appears in the proceeding as a single claimant, ordinary rules of civil procedure apply. The real challenge is finding and categorizing possible claimants and dividing them into manageable 'portions' for a group proceeding. This type of work is carried out by the association which appears on behalf of the claimants and not by the court.

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<sup>42</sup> Austrian Supreme Court, 12 July 2005, 4 Ob 116/05w.

**c. Case-management and deadlines**

There are special rules on case management or deadlines.

**d. Expediency**

Since the Austrian model of group litigation utilizes the same procedural framework as individual lawsuits, the time frame is roughly the same as in individual litigation (see, in this regard, chapter II. 8. d. above). Obviously, since group actions typically involve complex questions of law and fact (such as investor suits for damages), the duration of these cases will typically be on the higher end of the spectrum.

While, in the early years of group action proceedings, the composition of the group, the jurisdiction of the court and the propriety of the funding (in light of the contingency fee involved) were vigorously challenged, often resulting in protracted litigation, it seems that these issues now seldom lead to significant delays any more.

**e. Evidence/discovery rules**

There are no special rules on evidence or discovery for this type of proceeding. Occasionally criminal proceedings are used in mass damages cases as a vehicle to bring civil claims. Austrian criminal law allows the victim of a crime to pursue his or her claims in the criminal proceeding. The court can award damages or grant other remedies if the defendant is convicted. In case of an acquittal, damages can only be obtained by way of a separate civil proceeding. This procedure of 'annex proceedings' (Adhäsionsverfahren) is available regardless of the number of claimants and is cheaper than initiating a separate civil litigation. While criminal courts in the past may have been reluctant to decide on civil claims (referring the victims to civil proceedings instead), this seems to have changed in recent years. Obviously, this avenue is available only if the damages claimed are the result of the criminal conduct of the defendant.

In 2015, the Austrian Supreme Court (1 Ob 39/15i) has ruled that claimants may also present indirect evidence (practically most relevant are files and records from administrative proceedings against the defendant) to the court. For further information, please refer to chapter II. 8. e. above.

A 2017 reform, implementing the cartel damages directive, introduced a limited form of discovery for cartel damages cases.

**f. Interim measures**

As far as it is necessary to secure the assigned claim, injunctions according to general rules may be issued. Given the nature of most claims (usually compensation for monetary damages), injunctions are rather the exception than the norm.

**g. Court-directed settlements and out of court settlements**

With regard to the 'Austrian model of group litigation', the same rules on settlements generally apply as already discussed above (chapter II. 8. g.). Further, as also already mentioned (chapter III. 3. above), it is common practice of Austrian courts to decide on one or a few claims by way of a partial judgment in order to permit the appellate courts to review the relevant questions of fact and law. Once these questions are answered, the remaining claims typically are settled by the parties.

## **9. Available remedies**

### **a. Types of damages**

The procedure is almost exclusively available for monetary damages. The reason for this is that the procedure is based on claims assigned to an association or other institution. Under Austrian case law, claims for a declaratory judgment normally cannot be assigned.

### **b. Allocation of damages/distribution methods**

There are no statutory rules regarding the allocation of damages and/or specific distribution methods. The association to which the claims have been assigned usually first pays the litigation financier, covers its own expenses (if any) and then passes on the remains of the recovered amount proportionally to the damaged parties. Details of the distribution are usually governed in further detail by respective agreements between the association, the process financing company and the damaged parties.

### **c. Availability of punitive/extra-compensatory damages**

Also with regard to the 'Austrian model of group litigation', there is no reward of punitive or extra-compensatory damages.

### **d. Skimming-off/restitution of profits**

Please refer to the comments above (chapter II. 9. d.). No special rules apply to the 'Austrian model of group litigation'.

### **e. Injunctions**

Please refer to the comments above (chapter II. 9. e.). No special rules apply to the 'Austrian model of group litigation'. Injunctions are, however, relatively seldom in respective cases.

### **f. Limitation periods**

There are no special rules regarding limitation periods under the 'Austrian model of group litigation'. General rules apply, please also refer to chapter II. 9. f.

## **10. Costs**

Please refer to the comments above (chapter II. 10.). No special rules apply to the 'Austrian model of group litigation'.

## **11. Lawyers' Fees**

Please refer to the comments above (chapter II. 11.). No special rules apply to the 'Austrian model of group litigation'.

## **12. Funding**

The 'Austrian model of group litigation' has the advantage of yielding a sufficiently high amount in dispute which enables the claimants to use commercial litigation finance. This enables the claimant to pursue his or her

claim without any risk. On the other hand, the fee for the litigation finance will generally be between 25 and 40 percent of the overall amount recovered. The Austrian Supreme Court has held that a defendant has no standing to challenge such a fee arrangement.<sup>43</sup> Commercial litigation finance is used quite often in this type of proceeding. Initially, the possibility of using litigation finance was one of the major driving factors in inventing this procedure. Since litigation-funding agreements are not normally divulged, no exact figures as to the frequency of the use of litigation finance are available. It is a safe assumption that all the 'big proceedings' described above with more than 50 claims brought in one proceeding use litigation finance. Coordination of contributions to the costs of such a large number of claimants would be difficult in practice. Some proceedings for unsuitable investment advice are brought without litigation finance, but this seems to be the exception rather than the norm.

As already mentioned, currently there are plans for a private association that is intended to raise the required capital for consumer mass litigation, in particular by means of crowd funding (COBIN, see III. 3. a. above).

### **13. Enforcement of collective actions and settlements**

No specific rules regarding enforcement of collective actions and settlements exist. They are subject to ordinary enforcement via execution proceedings

### **14. Number and types of cases brought/pending**

The procedure is extremely important in practice. Whilst initially it was used mainly in proceedings with a few dozen claims, it is now the vehicle to bring large numbers of claims in one proceeding. Today, the area where this type of proceeding is used most prominently is investor suits for damages for unsuitable investment advice. In 2013,<sup>44</sup> there were about 22,000 investor claims pending before the Vienna Commercial Court and the Vienna Commercial District Court. Of these, about 12,700 claims were brought by way of 22 group proceedings which combined more than 50 claims per proceeding. The average number in this category was 580 claims per proceeding. In addition, there were 72 smaller group proceedings with less than 50 claims per proceeding. 1,400 claims were brought in this way, resulting in an average of 20 claims per proceeding. In recent years, the number of group proceedings has declined. Thus, it seems that in 2013 no such proceeding was brought, in 2014 and 2016 only one each and in 2015 two.<sup>45</sup> This is probably due to the fact that most cases arose in the aftermath of the financial crisis of 2007/2008. Since under Austrian law claims for damages are time-barred after three years, such claims will not be brought any more.

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<sup>43</sup> Austrian Supreme Court, 27 February 2013, 6 Ob 224/12b.

<sup>44</sup> The figures given here are as of 31 December 2012. They are taken from an unpublished lecture by Judge Parzmayr, judge of the Commercial Court, on 25 April 2013.

<sup>45</sup> It should be noted that there is no official statistics for group proceedings. Therefore, the numbers provided above are based on information provided by individual judges of the Vienna Commercial Court.

## 15. Impact of the collective mechanism on stakeholders

The emergence of the Austrian model of group litigation has certainly led to an increased supply of commercial litigation funding. Austria is, however, far away from "US conditions" or a "claims industry", as sometimes envisioned by opponents of mass litigation procedures. Often, associations have to resort to German litigation financiers. Further, (consumer) associations regularly scan potential mass litigation cases and offer support to potential claimants.

## 16. Problems, critiques and calls for reform

The current system generally works quite well in practice. There are, however, certain critiques of the current system that have been identified in the literature.<sup>46</sup> Traditional procedural institutes like joinder or consolidation of cases are suitable for some cases, but certainly not for all. In particular in cases with a large number of parties, the coordination of the proceedings poses severe problems to the court. Test cases are a cost-saving possibility to settle controversial factual and legal matters, but they require the consent of the defendant party, which is unsatisfactory from the perspective of access of law.

The 'Austrian model of group litigation' is suited to solve some of the problems arising from traditional multi-party practice, but not all of them. First, from the perspective of access to justice, it is questionable that the assignment of one's claim to an association is, in many cases, the only practical way of pursuing one's claim. Further, due to the required amounts in order to get litigation funding, it is currently the case that disputes with rather low amounts in dispute (e.g. mass and dispersed damages) are less likely to cause respective actions. In addition, the financial and personnel resources available to associations organizing mass litigations may further limit the number of claims that can be brought in this way.

In light of an increase in mass litigation and the abovementioned problems, a draft for a group procedure has been promulgated by the Austrian Ministry of Justice in 2007, which was not to replace, but to supplement the procedure currently used. Under this draft, a new group proceeding will be introduced for cases involving three or more claimants, and a large number of (probably more than 50) claims and similar questions of law and fact. However, a claimant is always free to pursue his claims as an individual action instead of participating in the group proceeding. The court decides on all common questions of fact and law by judgment. Any questions not resolved in the group proceeding have to be determined in individual lawsuits. The draft was met with severe resistance by the Chamber of Commerce and, consequently, the Conservative Party. Given the present political situation (end of coalition government and early elections to be held in October 2017)), implementation of the reform is unlikely in the near future.

In 2015, collective redress and its potential reform was discussed at the 19th Austrian *Juristentag*,<sup>47</sup> but did eventually not lead to respective legislative action. Recently, the president of the Viennese bar association publicly and firmly called for legislative action.<sup>48</sup>

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<sup>46</sup> Kodek 2015 137 et seq.

<sup>47</sup> Oberhammer 2015 73 et seq.

<sup>48</sup> Newspaper "Die Presse", 25.4.2017.

## **17. Incompatibilities with the Recommendation's principles**

Despite the absence of a statutory collective redress procedure, the current Austrian framework, including traditional means of multi-party proceedings and the 'Austrian model of group litigation', is in large measure in line with the Recommendation's principles. Austrian law does not, for instance, provide for any punitive damages (Recommendations para 31), jury awards or pre-trial discovery procedures (Recommendations recital 15). Further, the current Austrian framework is consistently based on the opt-in model (Recommendations paras 21 et seq). Austrian courts are also able to dismiss manifestly unfounded cases (Recommendations para 13) and may even impose financial sanctions on the claimant in such cases (§ 408 Austrian Code of Civil Procedure). There are several ADR-mechanisms (Recommendations para 26) in place that, within certain limits, are also able to handle collective claims. In addition, as to the costs, Austria has a 'loser pays' rule (Recommendations para 13); *pacta de quota litis* (Recommendations para 30: contingency fees) are not permissible under Austrian civil law (§ 879 para 2 number 2 Austrian Civil Code).

Some of the recommendations are quite difficult to assess due to their general character, e.g. whether the collective redress procedures are "fair, equitable, timely and not prohibitively expensive" (Recommendations para 2). In general, this is certainly the case with regard to the Austrian framework. However, due to a lack of specification of the relevant evaluation criteria, precise assessments are difficult.

There are also certain parts of the Austrian framework that are not in line with the Recommendation's principles, the most important being the standing to bring a representative action (Recommendation paras 4 et seq) and the control of litigation funding by the court where the financed proceeding is pending (Recommendation paras 14 et seq).

Currently, there are no special restrictions on standing. Therefore, any association is generally entitled to pursue claims that have been assigned to it (and claimants are free to assign their claims to whatever association they deem appropriate). The Recommendation's restrictions (non-profit making character, direct relationship between the main objectives of the entity and the rights granted under Union law, sufficient capacities) are, therefore, currently not met. Further, as any association is entitled to pursue claims, there is also no procedure to ensure that entities lose their status (Recommendation para 5) once the requirements are not any longer met. This, however, hardly leads to any negative consequences in practice, as most of the associations that organize representative actions nevertheless fulfil the requirements of the Recommendation, even if they are not statutorily required to do so.

Further, there is currently also no judicial control of litigation funding, as provided by the Recommendation (paras 14 et seq). Quite to the contrary, the Austrian Supreme court has ruled in 6 Ob 224/12b that the defendant does not have standing to dispute a contingency fee arrangement between a claimant and a litigation finance company. Claimants are, therefore, neither required to declare to the court the origins of their funds (para 14), nor is there a specific rule that would allow the court to stay the proceedings (para 15) in case the criteria stated in the Recommendations are not met.

Given the fact that there is currently no formalized collective redress procedure, there is also neither an official channel for the distribution of



information on collective redress actions nor a national registry of respective actions (Recommendation paras 10 et seq, 35 et seq). In practice, associations assisting claimants under the 'Austrian model of class action', however, regularly publish information on currently pending mass litigations (e.g. on their homepage, via newspapers, etc), which usually ensures that potential claimants are informed about pending actions. There are currently also no special rules on the question whether representative entities from other Member States are permitted to seize Austrian courts (Recommendation para 18). This question is governed by general principles of Austrian civil procedure which determine whether an association has standing before Austrian courts.

With regard to the recommendation that an individual member of the claimant party should be free to leave the claimant party any time before the final judgement is given or the case is otherwise validly settled, being subject to the same conditions that apply to withdrawal in individual actions (para 22), it has to be noted that the 'Austrian model of group litigation' involves a generally binding assignment of claims to an association. According to general rules, this assignment of claims cannot be unilaterally revoked by the assigning party, unless otherwise stipulated in the respective agreement.

## **18. Problems relating to access of justice/fairness of proceedings**

In general, the Austrian framework ensures satisfactory outcomes regarding access to justice and the fairness of proceedings. Problems arise in particular with regard to disputes with rather low amounts in dispute (e.g. mass and dispersed damages). Here, there are usually not sufficient incentives to bring respective suits before the courts. Individual claimants refrain from actions due to the (comparably) high costs and the risk of a potential loss. The 'Austrian model of group litigation' is usually also not available in these cases, as no litigation funding will be available. Further, it is not guaranteed that individual claimants find an association that is willing to organize and perform respective mass litigation. Here, respective legislative measures would be necessary in order to ensure consistent access to justice.

The current Austrian framework generally prevents abusive litigation. Due to the presence of a 'loser pay' rule, claimants refrain from bringing suits without any legal cause. With regard to the 'Austrian model of group litigation', the prospects of success of a respective litigation are being examined by both the association organizing the suit as well as the litigation financier (and their respective attorneys). Therefore, it is rather unrealistic that abusive litigation will be brought before the courts. In case of a manifestly unfounded action, Austrian courts are able to dismiss respective cases and impose financial sanctions on the claimant.

## **III. Sectoral Collective Redress Mechanisms**

### **19. Labour Law**

Austrian civil procedure provides for a specific collective procedure in certain labour law cases. Here, certain associations may bring actions for a

declaratory judgment if the case concerns a question of labour law and is relevant for three or more employees.<sup>49</sup>

## **20. Partial debentures**

The only area of the law where there is a truly collective redress mechanism concerns claims arising from certain bonds (*Teilschuldverschreibungen* – partial debentures). For respective claims, a statute of 1874 (the *Kuratorensgesetz*) provides for the appointment of a curator who shall then represent the bond holders in court and, possibly, in insolvency proceedings. While this statute is of considerable interest from a scholarly point of view, and, in part, also served as a model for the reform bill proposed in 2007 (as discussed previously), it seems that it is only used extremely rarely in practice. This is not due to the fact that the procedure provided for by the statute was inadequate, but rather that all claims brought for unsuitable investment advice and related claims in the past involved other types of bonds or securities to which the statute does not apply. Therefore, this statute does not need to be discussed in further detail.

## **21. Appointment of a curator**

In addition, several other statutes authorize the courts to appoint a curator in mass proceedings. In most cases, this is for purposes of service only (but see the exception regarding claims arising from certain bonds – *Teilschuldverschreibungen* – mentioned above).<sup>50</sup>

## **22. Special provisions for landlord-tenant cases**

Special provisions exist for landlord-tenant cases involving more than six parties.<sup>51</sup> Here, service can be fulfilled by posting of the documents in the respective house or by sending the documents to a curator appointed by the court. These rules are only designed to simplify the service of documents; they do not restrict the parties' right to appear per se or by an attorney.

## **23. Injunctive relief sought by associations**

According to § 29 Konsumentenschutzgesetz (Consumer Protection Act), certain associations are entitled to seek injunctive relief. This provision implements the Injunctions Directive 98/27/EC.

## **24. Administrative proceedings**

There are also special provisions for mass proceedings in administrative law. Again, these provisions authorize service by publication. In certain proceedings regarding permits for businesses, the administrative authority is

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<sup>49</sup> § 54 Labour and Social Courts Act (*Arbeits- und Sozialgerichtsgesetz*).

<sup>50</sup> Law of April 24, 1874, *Reichsgesetzblatt* 1874/49. There are similar provisions in §§ 225 et seq of the Stock Corporation Act (*Aktiengesetz*) for mergers and other forms of corporate reorganization.

<sup>51</sup> § 37 paragraph 3 Tenancy Law Act (*Mietrechtsgesetz*).

authorized to appoint a curator if twenty or more parties have raised objections which are substantially similar.<sup>52</sup>

## IV. Information on Collective Redress

Due to the lack of a formalized collective redress mechanism in Austria, there is currently neither an official channel for the distribution of information on collective redress actions nor a national registry of respective actions. However, associations assisting claimants under the 'Austrian model of class action' regularly publish information on currently pending mass litigations (e.g. on their homepage, via newspapers, etc),

## V. Case Summaries

<u>Case name</u> n.a.	<u>Keywords</u> Jurisdiction, consumer, data protection
<u>Reference</u> OGH 20.7.2016, 6 Ob 23/16z	<u>Summary of claims</u> The decision was rendered in a case in which the claimant purportedly has assembled some 5,000 other 'victims' (both from Austrian, other EU member states and non-member states) claiming that their rights under data protection law have been violated.
<u>Subject areas</u> Procedural law, Data protection law	
<u>Dispute resolution method</u> Austrian model of group action	<u>Findings</u> The Austrian Supreme Court initiated a preliminary ruling procedure before the European Court of Justice, concerning the question whether a claimant to whom other consumers assigned their claims can invoke the jurisdiction under Article 15 Brussels I Regulation 2001 (which is available only to consumers) if he – in connection with the enforcement of his alleged claims against Facebook – publishes books, gives paid lectures, operates webpages, raises donations and organizes an action under the 'Austrian model of class action'. Further, the Austrian Supreme Court wanted to know whether a consumer can, simultaneously with his own claims, claim jurisdiction under Article 16 Brussels I Regulation (2001) for claims of other consumers from (1) the same Member State, (2) other Member States or (3) a non-Member State, that have previously been assigned to him.
<u>Court or tribunal</u> Austrian Supreme Court	
<u>Cross-border character/ implications, if any</u>  Consumers from EU member states and non-member states involved	
<u>Opt-in</u>	Outcomes: see above Settlement: no
<u>Type of funding</u> third party funding	<u>Remedy:</u> injunctive and damages <u>Amount of damages awarded:</u> n.a. (see above)
<u>Costs</u> loser pays principle	<u>Distribution of damages:</u> n.a. (see above)

<sup>52</sup> § 365c *Gewerbeordnung* (Business Act).

<u>Abusive litigation</u> no	

<u>Case name</u> n.a.	<u>Keywords</u> Litigation finance, pactum de quota litis, contingency fee
<u>Reference</u> OGH 27.2.2013, 6 Ob 224/12b	<u>Summary of claims</u> The decision was rendered in an Austrian model of group action concerning damages for poor investment advice. The decision, however, only concerned the question whether a defendant has standing to dispute a contingency fee arrangement between a claimant and a litigation finance company.
<u>Subject areas</u> Procedural law Civil law	
<u>Dispute resolution method</u> Austrian model of group action	<u>Findings</u> The Austrian Supreme Court held that a defendant did not have standing to dispute a contingency fee arrangement between a claimant and a litigation finance company. Rather, the prohibition of the pactum de quota litis in § 879 Abs 2 Z 2 Austrian Civil Code was only intended to protect the client, not his adversary.
<u>Court or tribunal</u> Austrian Supreme Court	
<u>Cross-border character/ implications, if any</u>	<u>Outcomes</u> See above
<u>Involvement of German litigation financier</u>	<u>Remedy: damages</u> <u>Amount of damages awarded:</u> n.a. (see above) <u>Distribution of damages:</u> (see above)
<u>Opt-in</u>	
<u>Type of funding</u> third party funding	
<u>Costs</u> loser pays principle	
<u>Abusive litigation</u> no	

<u>Case name</u> n.a.	<u>Keywords</u> Joinder, certification, Austrian group action
<u>Reference</u>	<u>Summary of claims</u>

<p>OGH 12.7.2005, 4 Ob 116/05w</p> <p><u>Subject area</u> Procedural law</p>	<p>The case concerned a group action on behalf of 684 consumers claiming that the bank had charged excessively high interest rates.</p>
<p><u>Dispute resolution method</u> Austrian model of group action</p> <p><u>Court or tribunal</u> Austrian Supreme Court</p>	<p><u>Findings</u> Despite objections made by the defendant, the trial and appellate courts allowed all claims in one action. The Supreme Court affirmed, holding that no appeal lies against decisions of this kind. Furthermore, raising several claims in one action was permissible provided the claims were based on substantially the same cause of action and concerned substantially similar questions of law and fact.</p>
<p><u>Cross-border character/ implications, if any</u></p> <p>no</p>	<p><u>Outcomes</u> The ruling of the Austrian Supreme Court held that the claim was procedurally permissible. No decision was rendered on the merits of the case. Therefore, no damages were awarded in this proceeding.</p>
<p><u>Opt-in</u></p>	
<p><u>Type of funding</u></p> <p>n.a.</p>	<p><u>Remedy: damages</u> <u>Amount of damages awarded: n.a. (see above)</u> <u>Distribution of damages: n.a. (see above)</u></p>
<p><u>Costs</u> loser pays principle</p>	
<p><u>Abusive litigation</u></p> <p>no</p>	

# BELGIUM – FACTSHEET

## **Scope**

No general collective redress mechanism

Collective redress is available for consumer claims.

Multiple claims may be joined together under the regular rules of civil procedure.

## **Problems/Incompatibilities with Recommendation principles**

Limited development of collective redress

The law introducing consumer collective actions does not provide for specific rules on injunctive relief

## **Standing** (Para. 4-7)

Collective redress procedures can only be initiated by a 'group representative'. This may be either:

- (a) a consumer organisation recognised by the Ministry for Economic Affairs.
- (b) a recognised association with a corporate purpose directed at collective damages
- (c) Federal Ombudsmen

## **Admissibility** (Para. 8-9)

The claim's admissibility is decided at the first stage of proceedings and in principle within 2 months of the filing of the claim.

A collective action will only be declared admissible when it can be shown that collective proceedings will be more effective than ordinary proceedings.

## **Information on Collective Redress** (Para. 10-12, 35-37)

Legislation provides that judgments must be published in the Belgian Official Gazette and specified official websites

Information on ongoing proceedings is only available through private sources

## **Problems/Incompatibilities with Recommendation principles**

No national registry is available

## **Funding** (Para. 14-16)

Third party funding is not prohibited but it is very rare since group representatives are not entitled to make a profit.

Funding is provided by consumer associations through their own funds

## **Problems/Incompatibilities with Recommendation principles**

There is no obligation on the claimant to disclose its source of funding.

Third party funding is not regulated.

## **Cross Border Cases** (Para. 17-18)

Foreign claimants may participate in collective proceedings on the same terms as domestic claimants, however, they must choose to opt-in to the proceedings.

## **Expedient procedures for injunctive orders** (Para. 19)

Injunctive orders are dealt with by the regular rules of civil procedure, which provide for summary proceedings to be expedited where necessary.

Parties can apply on an *ex parte* basis for interim measures where there are exceptional circumstances or urgency.

#### **Efficient enforcement of injunctive orders** (Para. 20)

The enforcement of Injunctive orders is dealt with under the regular rules of civil procedure.

Penalties, including periodic fines, can be imposed by the court for non-compliance

#### **Opt In/Opt Out** (Para. 21-24)

Availability of both options

Primarily it is for the parties to decide which system they use. However, where no agreement is reached the court has a wide discretion to decide which procedure to employ in order to best protect the consumers' interests.

An opt-in procedure is compulsory where the aim of the proceedings is to obtain damages for physical or moral harm.

The opt-in system is limited to domestic claimants

#### **Collective ADR and Settlements** (Para. 25-28)

Following the declaration of admissibility and the time period for opting in or opting out, the court will grant the parties a period of 3 to 6 months in which they are mandated to negotiate.

Any settlement requires the approval of the court.

#### **Problems/Incompatibilities with Recommendation principles**

Mandatory negotiation without the consent of the parties.

#### **Costs** (Para. 13)

The Loser Pays Principle applies

Costs are set by the law according to the amount at stake in the claim.

#### **Lawyers' Fees** (Para. 29-30)

A reasonable and proportionate success fee can be agreed.

However, agreements whereby a lawyer's fees will depend solely on the outcome of the case are prohibited.

#### **Problems/Incompatibilities with Recommendation principles**

Funding arrangements with lawyers are not subject to the approval of the court

#### **Prohibition of punitive damages** (Para. 31)

Extra-compensatory damages are not available.

#### **Collective Follow- on actions** (Para 33-34)

Collective follow on actions are not available.

#### **Interplay between injunctions and compensation across all sectors**

It is possible to apply for both compensation and an injunction in the same proceedings, however, it is more common for an injunction to be obtained at an interim stage.

# **BELGIUM – REPORT**

## **I. General Collective Redress Mechanism**

There is no general collective redress mechanism for representative actions in Belgium. The provisions regarding collective actions in the Economic Code, whilst framed in general terms, are only applicable in cases concerning the infringement of specified rights which can generally be described as relating to consumers.

## **II. Sectoral Collective Redress Mechanism: Consumer Law**

### **1. Scope**

The 28 March 2014 Law has a limited scope. It aims to enhance and reinforce the rights of consumers.

Only consumers can rely on the 28 March 2014 Law to bring a claim, provided they allege that the defendant, i.e. a legal or natural person pursuing long-term economic aims (hereinafter, an enterprise), has infringed a contractual obligation or one of the 31 regulations or laws listed in the 28 March 2014 Law.<sup>53</sup>

Hence, a claim cannot be brought by a consumer against government or public authorities, nor against non-profit organisations.

In addition, legal entities, independents, employees or investors cannot rely on the 28 March 2014 Law either to bring a claim in any of the aforementioned capacities.

### **2. Procedural framework**

The 28 March 2014 Law provides for a two-stage procedure if no agreement was reached before the filing of the petition.

If an agreement has been reached prior to the filing of the petition or in the course of the proceedings, the parties can request the Court to approve the agreement reached. The Court will refuse to approve the agreement if:

- the compensation for the group or subgroup is manifestly unreasonable,
- the delay during which the victims can decide to opt in or opt out is manifestly unreasonable,
- the additional publicity measures are manifestly unreasonable; or
- the indemnity to be paid to the group representative exceeds his real costs.

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<sup>53</sup> Actions for collective redress can only be brought if an enterprise has infringed obligations deriving from competition law, market practices and consumer protection, payment and credit services, intellectual property, energy, telecom, transport, pharmaceuticals, food, or insurance.



### **a. Competent Court**

The Courts of Brussels (either the French or Dutch Court of First Instance or the French or Dutch Commercial Court and, in appeal, the Court of Appeal) have exclusive jurisdiction to hear collective redress proceedings.

### **b. Standing**

The group of consumers who wish to initiate proceedings must consist of consumers who have suffered damage in their personal capacity due to a common cause. However, they are not capable of initiating the proceedings themselves. Collective redress proceedings can only be initiated by a 'group representative'. The legislator has opted for an 'ideological plaintiff', i.e. a claimant who defends the rights of the consumers, but does not aim to make profits. The group representative cannot be a lawyer and will not be able to make profits from his job. He will only receive the reimbursement of his real costs.

The 28 March 2014 Law recognises three categories of possible group representatives:

- (i) a consumer organisation with legal personality which is also represented in the 'Conseil de la Consommation / Raad voor Verbruik' (an advisory body within the Federal Public Service Economy) or is recognised by the Minister of Economic Affairs,
- (ii) an association which has had legal personality for over three years, which has a corporate purpose directly related to collective damages, which does not pursue an economic purpose in a sustainable manner, and which is recognised by the Minister, or
- (iii) the Federal Ombudsman (but the latter can only represent the group during the negotiation phase).

Only one group representative can be appointed per proceeding.

### **c. Availability of Cross Border collective redress**

It is possible to initiate class action proceedings against a foreign defendant before the Belgian Courts.

### **d. Opt-in / opt-out**

#### **Principal availability of either/or/both options?**

The 28 March 2014 Law allows the parties or the judge, in a case where no agreement has been reached, to choose between an opt-in (système d'option d'inclusion / optiesysteem met inclusie) or an opt-out system (système d'option d'exclusion / optiesysteem met exclusie). The choice is irrevocable.

#### **Conditions for either type**

The judge has a wide discretion in deciding which system will govern the proceedings. The preparatory works of the 28 March 2014 Law provide that an opt in should be applied in cases with a large number of consumers who suffered limited damages or when it is necessary to identify forthwith the members of the group.

However, where the aim of the proceedings is to obtain compensation for physical or moral harm, then the opt-in procedure is compulsory.

The Dutch speaking Court of First Instance of Brussels ruled in both the Thomas Cook case and the Proximus case that when deciding which system to be applied in a particular case it must first be assessed how the consumers' interests can be best protected in the specific case.

In the Thomas Cook case the Court ruled that an opt-in system would be applicable since it considered that consumers must have been aware that they have become a victim of damage and they could easily get an idea of their rights, the interest of the individual victims' in being part of the group is sufficiently protected by the opt-in system.

In the Proximus case the Court applied the opt-out system, since the Court took the view that the consumers were not necessarily aware of the potential misleading advertisement in relation to Proximus' new renting formula of its new decoders and that the damages were likely to be remote which might result in the affected consumers not taking any steps to join the proceedings should an opt-in mechanism govern the proceedings.

### **Opt-out restricted to in-jurisdiction claimants?**

Foreign claimants may take part in collective redress proceedings. According to the 28 March 2014 Law foreign plaintiffs must opt-in to the proceedings.<sup>54</sup>

### **If opt-out, is it justified by the sound administration of justice?**

Not applicable.

### **Specific measures related to the fact that affected persons are not identifiable**

None.

## **e. Main procedural rules**

### **Admissibility and certification criteria**

Article XVII.36, §3 ELC provides that a class action can only be declared admissible if it appears more effective than an individual action under ordinary law. To assess whether this condition is fulfilled the judge can take into account the following requirement:

- The potential size of the group of consumers who suffered damages,
- The existence of individual damage which can be sufficiently related to the collective damage,
- The complexity and legal efficiency of the action for collective redress,
- The legal certainty of the group of consumers,
- Efficient consumer protection,
- The smooth functioning of the judiciary.

### **Single or Multi-stage process**

Where no agreement was reached before the filing of the petition the proceedings continue in the following stages:

### **Admissibility phase**

The ELC provides that once a petition for collective redress has been filed, the Court must determine - within, in principle, a period of 2 months - whether

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<sup>54</sup> Article XVII.38, §1, 2° of the ELC.

the claim is admissible. The Court may ask for further details from the claimant, which should be submitted within 8 days. If the details are not submitted or submitted out of time or incomplete, the action is deemed to be not filed. The decision on the admissibility is generally not rendered within two months after the filing of the petition. The Dutch speaking Court of First Instance of Brussels has ruled in a judgment dated 10 October 2016 that the 2 months period laid down in the ELC was not a binding time-period. If the safeguarding of the rights of defence of the parties so require, then aforementioned time-period to hand down a decision on the admissibility of a class action can be extended.

### **Mandatory negotiation phase**

If the Court declares the claim admissible, it will determine whether the case will be governed by an opt-in or an opt-out system and it will fix the time-period during which the consumers must either opt-in or opt-out ranging between 30 days and 3 months. In addition, the Court will grant the parties a period of time ranging between 3 and 6 months during which the parties are mandated to try to negotiate an agreement for collective redress. This period may be extended once on the joint request of the parties for no longer than 6 months.

### **If no agreement is reached, litigation phase**

The 28 March 2014 Law does not contain any provisions dealing with deadlines to be observed or abided by during the litigation phase. Therefore, the principles laid down in the Judicial Code will apply. During this phase the parties will exchange written pleadings addressing the merits of the claim, they will plead the case at the oral hearing before the court and the court needs to draft its decision. It is fair to assume that the litigation phase will last between 1 to 2 years (in first instance).

### **Distribution of the compensation phase**

The 28 March 2014 does not contain any provisions dealing with deadlines to be observed or abided by during the distribution of the compensation phase. It is obvious that the duration of the compensation phase will depend on the one hand on whether the court chose for an opt-in or opt-out mechanism and, on the other hand, on the number of consumers at stake. If the group is rather limited and the court decided to withhold an opt-in system it will be rather straightforward for the liquidator to award the compensation to the consumers.

### **Expediency (particularly in injunctive cases)**

Not applicable.

### **Evidence/discovery rules**

The 28 March 2014 Law does not amend the existing rules of evidence. The onus of proof rests (primarily) upon the claimants, i.e. the group representative.

### **Interim measures**

The 28 March 2014 Law does not amend the Judicial Code in respect of interim measures (e.g. as the appointment of an expert or an order to file specific documents with the court). Therefore the group representative can

request within the framework of collective redress proceedings such measures. Interim measures are usually heard at the introductory hearing or during the course of the proceedings at a specific hearing only dealing with the requested measures, i.e. prior to the hearing on the merits of the claim. If the case is very urgent or if specific circumstances exist, a plaintiff can apply via an *ex parte* petition for interim measures.

### **Court directed settlement option during procedure**

The 28 March 2014 Law does not provide for court directed settlements. The court does not take part in the mandatory negotiations which must take place between the parties if the class action is declared admissible.

### **In case of out of court settlements: judicial control**

If during the mandatory negotiations the parties reach an agreement, the court will endorse it, save if it takes the view that:

- The agreed compensation is manifestly unreasonable for the group or for a subgroup of consumers,
- The fees paid to the group representative exceed his real costs.

## **3. Available remedies**

### **a. Type of damages**

The 28 March 2014 Law aims to grant consumers who have suffered damages full compensation for their loss. The 28 March 2014 Law does not amend the existing civil liability regime, neither does it introduce punitive damages into Belgian law.

The Court can order compensation to be paid either in kind or by equivalent.

### **b. Allocation of damages between claimants for compensatory claims/ distribution methods**

Since the 28 March 2014 Law does not amend the existing civil liability regime, each claimant must be awarded compensation for the damages suffered individually.

### **c. Availability of follow on or extra-compensatory damages and their conditions**

The 28 March 2014 Law does not introduce punitive damages into Belgian law

### **d. Skimming-off/ restitution of profits**

The 28 March 2014 Law does not provide for skimming-off or restitution of profits, but merely aims at compensating the consumers for the losses actually suffered.

### **e. Injunctions**

The 28 March 2014 Law does not contain any provisions dealing with injunction. Therefore the general principles apply.

**f. Possibility to seek an injunction and compensation within one single action**

The 28 March 2014 Law does not contain any provisions dealing with injunction. Therefore the general principles apply.

**g. Possibility to rely on an injunction in separate follow-on individual or collective damages actions**

The group representative will always have to convince the judge a that class action is well-founded and that the defendant infringed any of the infringed either a contractual obligation or one of the 31 regulations or laws listed in the 28 March 2014 Law and that this violation caused damage to the consumers.

**h. Limitation periods**

The 28 March 2014 Law does not amend the existing provisions on limitation periods. Therefore, contractual claims will be time-barred after 10 years and claims in tort will be timed-barred after 5 years as from the moment the victim has knowledge of both the existence of its damage and of the identity of the tortfeasor.

**4. Costs**

**a. Basic rules governing costs and scope of the rules**

The group representative can only receive the reimbursement of his real costs. He may not make any profit from the collective proceedings.

**b. Loser Pays Principle (and exceptions from it)**

Under Belgian law, the losing party has to bear the costs of the (collective) proceedings. There is no limit on costs except for the (capped) legal proceedings' costs, i.e. a lump sum the losing party has to pay to the winning party to cover the lawyers' fees of the winning party. The amount of the legal proceedings' costs is set by law and varies according to the amount at stake.

Under certain circumstances, the base amounts set by law may be increased or decreased by the court.

If the case is settled, costs and fees are set out in the agreement concluded by the parties.

**5. Lawyers' Fees: Availability (or not?) of contingency fees and their conditions**

It is prohibited under Belgian law for a counsel to agree with his clients that his fees will solely depend on the outcome of the case. However, a (reasonable, transparent and proportionate) success fee can be agreed.

**6. Funding**

The 28 March 2014 Law does not contain any provisions dealing with the funding of the class action proceedings.

## **Availability of funding**

Third party funding of action for collective redress is not prohibited. However, this type of funding is of limited interest since the group representative is not entitled to make profits from his job as he will only receive the reimbursement of his real costs.

## **7. Enforcement of collective actions/settlements**

### **a. Framework for enforcement**

The 28 March 2014 Law provides that the Court, if it considers the claim to be well-founded or if the parties have reached an agreement, will appoint a loss administrator (liquidateur / schadeafwikkelaar) to oversee the execution of the decision. He is obliged to create a provisional list of members of the group who have explicitly identified themselves to be members of the group or subcategory. He may exclude certain persons who have identified themselves as members if he is of the opinion that they do not meet the description of the group or subcategory, though he must give reasons for his decision.

The list is filed with the registry of the Court and is publicly available. At this point in time, the loss administrator notifies the members of the group he wishes to exclude. For the next 30 days, extendable by the Court if necessary, the representative and the enterprise may challenge the inclusion or exclusion of members on the list. After this period, the registrar has 14 days to notify both the loss administrator and the relevant member of the Court's decision, who then have 14 days to notify the registrar of their point of view. After this, the Court will decide on the final list of members who are to receive compensation.

### **b. Cross border enforcement**

Since a decision awarding compensation to consumers will always be laid down in a judgment, the rules governing the enforcement of a judgment will apply.

## **8. Number and types of cases brought/pending**

To the best of our knowledge, Belgian leading consumer organisation Test Aankoop / Test Achat has, since the entry into force on 1 September 2015 of the 28 March 2014 Law, initiated five class actions.

## **9. Impact of the collective mechanism (or lack of) on behaviour/ policy of stakeholders (direct/ indirect, economic/social impact)**

Given that class actions are very recent in Belgium and so far only a few proceedings have been initiated it is at this stage difficult to assess their impact on the behaviour or policy of stakeholders.

### **a. Incompatibilities with the Recommendation's principles**

The 28 March 2014 Law does not allow legal persons to claim compensation for the suffered harm since only consumers can rely on the Law neither does

the 28 March 2014 Law provide for a collective redress mechanism for injunctive relief.

**b. Problems relating to access of justice/fairness of proceedings including**

**Time and burden of collective actions on courts and parties compared to non-collective litigation**

The only difference regarding the timing of collective actions compared to non-collective litigation is the fact that the class action proceedings are twofold, i.e. an admissibility phase and a phase on the merits. The judgment declaring a class action admissible can be appealed and, given the backlog of the Court of Appeal of Brussels, there is a risk that a final judgment on the merits of the class action might be delayed should an admissibility judgement be appealed. In non-collective litigation the Court will in principle hand down a decision ruling on both the admissibility and the merits of the claim. Although this judgment can of course also be appealed the winning party can – at its own risks – enforce it pending the appeal proceedings.

**Risks of and examples for abusive litigation**

This risk is remote since the Belgian legislator has provided that only a limited number of non-profit organisation qualify as group representative who are entitled to initiate class action proceedings.

**Effective right to obtain compensation**

The 28 March 2014 Law does not adversely affect the right to obtain compensation.

There is no Belgian legislation providing for Sectoral Collective Redress Mechanisms.

### **III. Information on Collective Redress**

The 28 March 2014 Law provides that judgements handed within the framework of class action proceedings must be published in both the Belgian Official Gazette (Moniteur Belge / Belgisch Staatsblad) and on the website of the Federal Public Service Economy, SMEs, Self-Employed and Energy.

### **IV. Case summaries**

SNCB	Keywords
Reference R.G. A/15/07232	First class action - compensation from the Belgian National Railway Company - interruption and the suspension of the train service during strikes
Subject area	

Consumer law	<p>Outcomes</p> <p>According to the publicly available information Test Aankoop / Test Achat has withdrawn its claim.</p>
Class Action	
French speaking Commercial Court of Brussels	
National	
Opt-in/out Not applicable	
Type of funding none	
Costs Not applicable	
Abusive litigation Not applicable	

<p>Thomas Cook</p> <p>Reference 2015/4019/A</p> <p>Subject area Consumer law</p>	<p>Keywords</p> <p>Thomas Cook – Delayed flight (Regulation 261/2004)</p> <p>Summary of claims</p> <p>Test Achat claimed compensation in accordance with Regulation 261/2004 on behalf of the passengers of a delayed flight</p> <p>Outcomes</p>
<p>Class Action</p> <p>Dutch speaking Court of First Instance of Brussels</p>	<p>Case is still pending, but is likely to be declared devoid of purpose since Thomas Cook claims to have paid the compensation to which the passengers are entitled.</p>



National	
Opt-in	
None	
Costs No decision yet	
Abusive litigation No	

<p>Volkswagen Reference A/16/2706 Subject area Consumer law</p>	<p>Keywords Emission scandal – misleading advertisement and alleged infringement of consumer protection law</p> <p>Summary of claims Test Achat argues that the tampering software constitutes an infringement of various provision of consumer protection law.</p> <p>Outcomes The case is still pending and the Dutch speaking court of Brussels will hear the arguments of the parties relating to the (in)admissibility of the class action at the oral hearings of 30 and 31 October 2017.</p>
<p>Class Action  Dutch speaking Court of First Instance of Brussels</p>	
<p>5 of the 6 defendants are foreign legal entities</p>	
<p>Opt-in/out No decision yet</p>	
<p>Type of funding None</p>	

Costs No decision yet	
Abusive litigation No decision yet	

Proximus Reference 2016/4461/A Subject area consumer	Keywords New renting formula of decoders - misleading information  Summary of claims Test Achat argues that Proximus misled its consumers by giving the impression that they were entitled to a one year free subscription, whereas the offer actually started as from the moment they received their new decoder instead of as from 1 February 2017 when the old decoders would no longer be compatible.
Class Action  Dutch speaking Court of First Instance of Brussels	Findings The Court has declared the claim admissible, but not yet ruled as to whether Proximus misled is consumers.
Cross-border character/ implications, if any None	
Opt-out	
Type of funding None	
Costs No decision yet	
Abusive litigation No	

# BULGARIA – FACTSHEET

## Scope

Bulgarian law provides for a horizontal collective redress mechanism, injunctive and compensatory.

There are also specific consumer mechanisms:

- Collective action for injunctive relief, for the cessation or prohibition of any infringement harmful to collective consumers' interests
- Collective (group/class) action for damages to the collective consumers' interests
- Collective action for damages suffered by consumers

## Standing (Para. 4-7)

Horizontal mechanism: any harmed persons, or organizations established with a purpose to defend the interests allegedly infringed.

Consumers mechanisms:

- Collective action for injunctive relief: registered and qualified consumer protection organisations, and the Commission for Consumer Protection
- Collective action for damages suffered by consumers: any consumer organisation, provided it has been granted with a power-of-attorney to bring the action on behalf of at least two identified consumers who have suffered damage from the same infringement.
- Collective action for damages to the collective consumers' interests: any consumer association

## Admissibility (Para. 8-9)

Article 381 of the Code of Civil Procedure requires that the court hearing the case verifies the admissibility and regularity of the claim.

## Information on Collective Redress (Para. 10-12, 35-37)

There are a couple of channels, namely via:

- Announcement on the website of the Commission for Consumer Protection or other organisations for consumer protection;
- Publications in the press or other information in media;
- Announcement at the defendant premises

## Problems/Incompatibilities with Recommendation principles

No national registry

## Funding (Para. 14-16)

Collective actions are funded by various sources – state budget (the actions brought by the Commission for Consumer Protection), private donations, own financial resources of consumer organisations, and state funding.

Third party funding is unknown in Bulgaria.

## Problems/Incompatibilities with Recommendation principles

There is no regulation of third party funding.

### **Cross Border Cases (Para. 17-18)**

The horizontal collective redress mechanism can be applied to cross-border disputes. The general procedural rules on parties located abroad will be relevant.

An action for collective redress can be brought by a qualified consumer protection organisation from any other member state of the EU, provided that an infringement of collective interests of consumers committed in Bulgaria has effects also on its territory and it is included in the list of qualified organisations prepared by the European Commission published in the Official Journal

Despite this provision, Bulgarian legal practice does not seem to have so far experienced any cross-border collective redress.

### **Expedient procedures for injunctive orders (Para. 19)**

At the request of the claimant, the court hearing the case may rule on adequate interim measures for the protection of the harmed interests.

### **Problems/Incompatibilities with Recommendation principles**

The lack of court chambers specialized in collective redress procedures can be considered as a disadvantage which appears to decrease the efficient case management as some judges are not very familiar with the specifics of this procedure.

### **Efficient enforcement of injunctive orders (Para. 20)**

If the defendant fails to comply, fines are applicable.

### **Opt In/Opt Out (Para. 21-24)**

Availability of both options:

- The court hearing the case shall accept as participants in the process other injured parties, organisations for protection of the injured persons, organisations for protection of the injured collective interest, that have requested a participation in the process within the stipulated term (Opt In), and
- The court decision is binding for all persons harmed by the same infringement and have not declared that they will bring individual claim for damages (Opt Out).

### **Problems/Incompatibilities with Recommendation principles**

The requirements the parties must meet are prescribed by law but it is up to the judge's discretion to decide if a certain person or organisation is meeting these conditions. This raises concerns about court capability to respond to the complex requirements for collective actions. Courts are not only expected to comply with all formal requirements of the legal procedure, but also to ensure a fair trial for all parties involved.

### **Collective ADR and Settlements (Para. 25-28)**

The court is required to direct the parties to a settlement and explain the advantages of voluntary dispute resolution (Article 384 (1) of CCP). The court approves the settlement only if it does not conflict with the law or good morals and if the harmed interest can be sufficiently protected.

The settlement takes effect only after it has been approved by the court (Article 384 (2) (3) of CCP).

### **Costs (Para. 13)**

The 'loser pays' principle applies. The court may lower the costs if they are excessive considering the actual length and factual complexity of the case.

### **Problems/Incompatibilities with Recommendation principles**

In general, the costs of collective actions procedures in Bulgaria are high, which seems to be an obstacle for bringing new collective actions, especially by consumer organisations.

### **Lawyers' Fees (Para. 29-30)**

The Bulgarian legal system allows conditional fee arrangements between a lawyer and a client, except for cases involving non-material interest (such as collective action for injunction).

### **Problems/Incompatibilities with Recommendation principles**

Contingency fees are possible and not explicitly regulated.

### **Prohibition of punitive damages (Para. 31)**

Punitive damages are not allowed under Bulgarian law.

### **Collective Follow- on actions (Para 33-34)**

It is possible to rely on an injunction decision in the follow-on actions for damages.

### **Interplay between injunctions and compensation across all sectors**

Injunction and compensation can be combined in one single action.

# BULGARIA – REPORT

## I. General Collective Redress Mechanism

The legal provisions of the Chapter 33 of CCP are applicable, Articles 379-388.

### 1. Scope/ Type

#### a. Horizontal

The approach is **horizontal**. The CCP provisions regarding the horizontal collective redress mechanism are applicable to infringements of any collective interest.<sup>55</sup> For instance this mechanism is applied to commercial law disputes, namely for repealing of a resolution of the general meeting of a joint-stock company with issued bearer shares;<sup>56</sup> furthermore for protection of collective interest against unfair competition such as misleading or comparative advertising, imitation or abuse of stronger bargain power<sup>57</sup>; environmental claims<sup>58</sup> as well as for protection of collective interests of consumers.<sup>59</sup>

#### b. Injunctive or compensatory or both

According to Article 379 of the CCP, a collective action can take the form of

- A claim for declaratory judgement<sup>60</sup>
- A claim for injunction, or
- A compensatory claim.<sup>61</sup>

### 2. Procedural Framework

#### a. Competent Court

The court competent to hear the action is the district court<sup>62</sup>.

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<sup>55</sup> Stalev, Zhivko et al. Bulgarian Civil Procedure Law, 2012, p. 773.

<sup>56</sup> According to Article 74 (4) of the Commercial Act every shareholder may bring an action before the district court of the company's seat for the repeal of a resolution of the general meeting of a joint-stock company with issued bearer shares or by an investment company of the open-end type when such resolution is inconsistent with a mandatory provision of the law or with the articles or, respectively, the Articles of Association of the company. The action shall be examined according to the procedure established by Chapter Thirty-Three "Proceedings on Collective Actions" of the Code of Civil Procedure. Exclusion from participation shall not be admitted in this case. See Decision № 137 / 26.04.2016 Commercial Case № 156/2016 the Court of Appeal – Plovdiv.

<sup>57</sup> Article 98 (4) of Protection of Competition Act 2008 referring to Chapter 33 of CCP.

<sup>58</sup> Quality of air - Ruling № 84 / 24.02.2015 Civil Case № 24 /2013 the District Court - Smolyan

<sup>59</sup> Article 186 of the CPA referring to the Chapter 33 of CCP.

<sup>60</sup> See Ruling № 131 / 10.09.2012 Commercial Case № 1036 /2010 the Supreme Court of Cassation, II commercial division; Decision № 2718 / 05.04.2016 Civil Case № 12066 /2011 the City Court – Sofia;

<sup>61</sup> See also Stalev, Zhivko et al. Bulgarian Civil Procedure Law, 2012, p. 774.

<sup>62</sup> According to Article 380 (1) of CCP. See also Chernev, Silvi Collective Actions, Trud i pravo, <http://www.trudipravo.bg/mesechni-spisania/mesechno-spisanie-targovsko-i->

## b. Standing

Collective action can be brought for protection against infringements of collective interest, namely where, due to the nature of the infringement, the circle of the affected persons cannot be defined precisely but is identifiable – Article 379 (1) of CCP. The standing is granted to any of the following:

- Any persons who claim that they are harmed by the infringement of collective interest (injured parties),
- An organisation established *ad-hoc* for protection of the persons affected by a certain infringement of collective interest, or
- An organisation established for protection against infringements of collective interests.

In Bulgarian legal literature it has been pointed out that the uncertainty about identification of individuals affected (only identifiability of their class/group) is a characteristic of the subject of the procedural relationship, including in cases where the action is brought by organisations designated to protect the collective interests. This is because the subject of a procedural relationship is always the class (the group) and the organisation-plaintiff has the role of a special kind of a representative who performs all procedural actions in the name of and on behalf of all persons who constitute the class (the group).<sup>63</sup> This is a feature of collective actions which distinguishes them from joint claims brought by relatively large groups of individually defined persons under the conditions of the subjective joinder of claims<sup>64</sup>. Whether a person belongs to the class (the group) or not, is determined based on specific criteria related to the particular features of the committed infringement over a given period of time and within certain territorial limits, for instance all customers of a certain telecommunication company XYZ for year 2016. Therefore, legal authors assume that the composition of the class (the group), though not individually defined, is rather stable and unchangeable.<sup>65</sup> Furthermore, the legal authors stress out that despite meeting the class-defining characteristics, the persons who have explicitly requested to be excluded from the collective action (performed the right on Opt Out), are no longer an element of the circle of persons whose interests are protected in the collective proceedings (the class/group).

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obligacionno-pravo/menuonttkp1/240-proizvodstvo-po-kolektivni-iskove [Last visited on 15.05.2017]; Stalev, Zhivko et al. Bulgarian Civil Procedure Law, 2012, p. 774.

<sup>63</sup> Chernev, Silvi Collective Actions, *Trud i pravo*, <http://www.trudipravo.bg/mesechni-spisania/mesechno-spisanie-targovsko-i-obligacionno-pravo/menuonttkp1/240-proizvodstvo-po-kolektivni-iskove> [Last visited on 15.05.2017]; see also Decision № 207 / 24.01.2012 Commercial Case № 580 /2011 the Supreme Court of Cassation, II commercial division; Decision № 2718 / 05.04.2016 Civil Case № 12066/2011 the City Court – Sofia.

<sup>64</sup> Chernev, Silvi Collective Actions, *Trud i pravo*, <http://www.trudipravo.bg/mesechni-spisania/mesechno-spisanie-targovsko-i-obligacionno-pravo/menuonttkp1/240-proizvodstvo-po-kolektivni-iskove> [Last visited on 15.05.2017] see also Decision № 198 / 02.10.2013 Civil Case № 1420 /2013 the Supreme Court of Cassation, III civil division.

<sup>65</sup> Some changes in the class members may occur in the event of a succession which happened after the infringement, inasmuch as the rights protected by the collective action may pass to the successors and are not strictly personal – Chernev, Silvi Collective Actions, *Trud i pravo*, <http://www.trudipravo.bg/mesechni-spisania/mesechno-spisanie-targovsko-i-obligacionno-pravo/menuonttkp1/240-proizvodstvo-po-kolektivni-iskove> [Last visited on 15.05.2017]

### **c. Availability of Cross Border collective redress**

The horizontal collective redress mechanism can be applied also to cross-border disputes. The general procedural rules on parties located abroad will be relevant, namely rules on summonses (Articles 40, 48 of CCP), rules on territorial judicial competence for a defendant without a permanent address in Bulgaria (Article 107 of CCP), establishment of facts which have occurred abroad (Article 548 of CCP) as well as the Part VII of CCP "Special rules regarding proceedings in civil cases subject to operation of Community law".

Bulgarian legal practice however does not seem to have experienced so far any such cross-border collective redress proceedings.

### **d. Opt In/ Opt Out**

#### **Principal availability of both options**

Bulgarian legislation allows both options, namely the court hearing the case shall:

- accept for participation in the process other injured parties, organisations for protection of the injured persons, organisations for protection of the injured collective interest, or organisation for protection against such infringements that have requested a participation in the process within the stipulated term (Opt In), and
- exclude injured parties who have stated within the timeframe set that they will pursue their defence independently in a separate process (Opt Out) – Article 383 of CCP.

#### **Conditions**

The legal provisions prescribe some general requirements the parties should meet, namely they need to belong to any of the following categories "injured parties, organisations for protection of the injured persons, organisations for protection of the injured collective interest, or organisation for protection against such infringements" (Article 383 (1) of CCP). It is up to the judge discretion to decide if a certain person or organisation is meeting these criteria, which raises some concerns in the legal literature about court capability to respond to the even higher and more complex requirements for the role of the court in the collective actions proceedings. Courts are not only expected to comply with all formal requirements of the legal procedure, but also to ensure a fair trial for all parties involved.<sup>66</sup>

#### **Opt-out justified by the sound administration of justice**

The dispositive principle is one of the fundamental principles of Bulgarian Civil Procedure Law – Article 6 of CCP. Persons can freely decide whether to commence a court proceeding for protection of their civil law rights, define the scope of protection of their rights, or even terminate the civil court case (or their participation in it) at any time. Therefore, the provision of Article 383 (1) p. 2 of CCP (Opt Out option) can be considered compliant with the main principles of Civil Procedural Law.

#### **Specific measures related to the fact that affected persons are not**

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<sup>66</sup> Chernev, Silvi Collective Actions, Trud i pravo, <http://www.trudipravo.bg/mesechni-spisania/mesechno-spisanie-targovsko-i-obligacionno-pravo/menuconttkp1/240-proizvodstvo-po-kolektivni-iskove> [Last visited on 15.05.2017]



## **identifiable**

The class of affected persons needs to be defined in the legal claim without identifying each and every individual. For this purpose, the law requires that the court hear in an open session (with summoning of the plaintiff and the defendant) all parties' observations on the circumstances determining the class of the persons affected and the manner of communication of the collective action to the public – Article 382 (2) of CCP. The Court states an appropriate way of communicating the claim (how many messages, by what media, and for how long they should be made) as well as an appropriate term after publishing in which injured parties can declare whether they are willing to participate in the proceeding (Opt In) or will pursue protection of their rights in a separate proceeding (Opt Out) – Article 382 (2) of CCP.

### **e. Main procedural rules**

#### **Admissibility and certification criteria**

Article 381 of CCP requires that the court hearing the case verifies the admissibility of the claim<sup>67</sup> and the regularity of the claim<sup>68</sup>; the court shall additionally *ex officio* verify the ability of the person or persons who have brought the action to seriously and in good faith protect the injured parties and bear the costs of the proceedings, including expenses. The court may hear in an open session the person or persons who filed the claim. The court will only allow the hearing of the case should any of the plaintiffs meet the above-mentioned conditions – Article 381 (3) of CCP.<sup>69</sup>

#### **Single or Multi-stage process**

It is a multi-stage process. Initially, in a **closed session** the court verifies the admissibility and regulatory of the claim as well as the certification of the plaintiff – Article 381 (1) of CCP.

Afterwards, in an **open session** with summoning of the parties, the court hears the parties' observations on the circumstances determining the class of the injured parties and the manner of communication of the collective action to the public – Article 382 (1) of CPP.

The whole collective action can in general go through **three instances** - first, appeal and cassation. The cassation is admissible only for civil claims for damages over 5,000 BGN<sup>70</sup>.

#### **Case-management and deadlines**

Apart from the general procedural deadlines<sup>71</sup>, the Code of Civil Procedure contains special provisions on deadlines specific to the collective actions, for

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<sup>67</sup> According to Article 130 of CCP where, upon verification of the statement of action, the court establishes that the action brought is inadmissible, the court shall return the statement of action.

<sup>68</sup> Regulated in Articles 127 and 128 of CCP – the statement of action must have certain content and attachments in order to be considered regular for hearing.

<sup>69</sup> See Ruling № 5951 / 14.11.2016 Commercial Case № 7904 /2013 the Sofia City Court – the proceeding was terminated because the organisation-plaintiff could not provide evidences for having sufficient financial resources for bearing the costs of proceeding.

<sup>70</sup> Article 280 (2) CCP.

<sup>71</sup> For instance, one week for the defendant to take a stand to the statement of action (Article 312 (2) of CCP), fortnight – for lodging an appeal against the decision of the first instance court (Article 259 (1) of CCP).

instance the deadline for Opt Out/Opt In – Article 382 (2) of CCP. The duration is defined by the court and is announced to the public so that the interested parties can request to be excluded from, respectively included in the proceeding.

### **Expediency (particularly in injunctive cases)**

Article 310 of CCP provides a summary procedure only for cases of ascertainment and cessation of infringement of rights under the Consumer Protection Act (injunction).

### **Evidence/discovery rules**

General procedural rules are applicable – Chapter 14 “Evidence” of CCP.

The main principle is that each party bears the burden of proof for the facts their claims and objections derive from – Article 154 (1) of CCP. Exceptions are facts based on presumptions (Article 154 (2) of CCP) as well as any facts of common knowledge and any facts known to the court *ex officio*, of which the court is obligated to inform the parties (Article 155 of CCP).

Acceptable are the following evidences – testimony, explanations by parties, written evidences, expert witnesses, and inspection and certification.

### **Interim measures**

According to Article 385 (2) (3) of CCP, the court hearing the case, acting on a request by the plaintiff, may rule on adequate interim measures for protection of the harmed interests. The ruling may be modified or vacated by the same court in case of any change of circumstances, errors or omissions. The ruling is subject to appeal and cassation review, which do not prevent the enforcement of the ruling, unless the court competent to examine the appeal orders otherwise.

The interim measures requested by the plaintiff are not binding for the court hearing the case, which can rule measures deferring from the suggested ones.<sup>72</sup>

### **Court directed settlement option during procedure**

The court which the action has been brought before is obliged to direct the parties to a settlement and explain thereto the advantages of considering any options for reaching a voluntary resolution of the dispute (Article 384 (1) of CCP).

Additionally, a special provision in the summary procedure (Article 315 (1) of CCP) requires that the court, during the hearing for examination of the case, re-invite the parties to reach a settlement.

Bringing a collective action is not considered an obstacle for out-of-court settlement. For this purpose, the parties may attend hearing before reconciliation commission or mediator. If the parties reach agreement on commencement of mediation or another procedure for voluntary resolution of the dispute, the court proceeding shall be stayed.<sup>73</sup> In case a settlement has been reached, it then needs to be approved by the reconciliation commission as well as the court hearing the collective action case. The court checks

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72 In this regard see Ruling N° 184 / 30.03.2009 Commercial Case N° 164 /2009 the Supreme Court of Cassation, II commercial division

73 See Staley, Zhivko et al. Bulgarian Civil Procedure Law, 2012, p. 778.

whether the settlement agreement conflicts with the law or with good morals as well as if the measures it provides are suitable and sufficient for protection of the collective interest at stake.<sup>74</sup> The settlement agreement only takes effect after the court's approval – Article 384 (3) of CCP.

### **In case of out of court settlements: judicial control**

According to Article 384 (2) (3) of CCP, the court approves the settlement, agreement, conciliation or another accommodation reached on a partial or complete resolution of the dispute only if the accommodation does not conflict with the law or good morals and if the harmed interest can be protected in a sufficient degree through the measures included in the said accommodation. The accommodation on resolution of the dispute takes effect only after it has been approved by the court.

## **3. Available Remedies**

### **a. Type of damages**

The law provisions do not specify the type of damages that can be claimed in the collective compensatory action proceedings.

Bulgarian case law seems to accept the view that both pecuniary and non-pecuniary damage can be sought in such proceedings, depending on the specific facts and circumstances of each case.<sup>75</sup>

### **b. Allocation of damages between claimants for compensatory claims/ distribution methods**

The court may decree that the compensation be credited to an account of one of the plaintiffs, to a special account jointly disposable by the plaintiffs, or to a special account jointly disposable by the injured parties – Article 387 (1) of CCP. The court may obligate the plaintiffs to transfer the compensation to a special account jointly disposable by the injured parties, taking adequate measures to secure the execution of this obligation Article 387 (2) of CCP.

- Availability of punitive or extra-compensatory damages and their conditions – N/A
- Skimming-off/ restitution of profits - N/A
- Injunctions

The court hearing the collective action case may order the defendant to perform a specific act, to refrain from performing a specific act, or to pay a specific amount – Article 385 (1) of CCP.

Moreover, the court is not bound to accept the measures for protection requested by the plaintiff. Considering the specifics of the case and after considering the stand of the defendant, the court may as well order other measures which ensure adequate protection of the harmed interest, i.e. to act *ex officio* – Article 385 (4) of CCP. However as per the legal literature the

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<sup>74</sup> See Markov, Metodi "Collective actions for consumer protection", in "Society and Law", 2007/9, p.19.

<sup>75</sup> Ruling № 411/01.08.2016 commercial case № 754/2016 the Supreme court of Cassation, II commercial division.

court cannot grant damages in an amount higher than requested by the plaintiff.<sup>76</sup>

**c. Possibility to seek an injunction and compensation within one single action**

It is possible for the plaintiff to bring several actions against the same defendant by a single statement of action if the said actions fall within the competence of the same court and are subject to examination in the procedure of the one and same type – Article 210 (1) of CCP. When the actions brought are not subject to examination in the one and same type of procedure or the court determines that the joint examination of the said actions will be considerably impeded, the court can decree a dis-joinder of the actions – Article 201 (2) of CCP.

**d. Possibility to rely on an injunction in separate follow-on individual or collective damages actions**

It is possible to rely on an injunction decision in the follow-on actions for damages.<sup>77</sup>

According to Article 386 of CCP, the judgment of the court has legal effect for the infringer, the person or persons who have brought the action, as well as those persons who: 1. Claim they are harmed by the established infringement, and 2. Have not declared they wish to pursue a remedy independently in a separate procedure (did not Opt Out).

The persons who opted out may avail themselves of the decision by which the collective action has been granted, however they are not bound by the decision for dismissing the collective action.<sup>78</sup> That is why a list of the excluded persons must be attached to the decision of the court – Article 386 (2) of CCP.

**e. Limitation periods**

General rules are applicable – limitation period is 5 years.<sup>79</sup>

## **4. Costs**

**a. Basic rules governing costs and scope of the rules**

Some legal authors express regrets that the Bulgarian legislator has failed to lay down special rules on fees due on collective actions. In the Bulgarian legal system, the court fees in civil cases are particularly high (in the majority of cases they are determined as a percentage of the material interest to be protected). In the absence of special rules to determine the fees, the courts must look for the volume of material interest, which will usually be measured in thousands or even in millions of Bulgarian leva (BGN) for the compensatory collective actions. The fees set by the general rule will be impossibly high, and in practice, the applicability of the compensatory collective redress will be

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<sup>76</sup> See Stalev, Zhivko et al. Bulgarian Civil Procedure Law, 2012, p. 779.

<sup>77</sup> See Civil case 4247/2014 of City Court – Sofia Civil Case (injunction) and the follow-on № 16588/2015 City Court – Sofia (damages on collective interests).

<sup>78</sup> See Stalev, Zhivko et al. Bulgarian Civil Procedure Law, 2012, p. 779.

<sup>79</sup> Article 110 of the Obligations and Contracts Act.

frustrated<sup>80</sup>. There are suggestions that a special charging system for the collective action be introduced which takes into consideration the important role of the collective redress institute for the protection of minor individual interests for which no adequate legal remedies would otherwise be available.

Costs consist of:

- Court fees – the injunction action can be considered as a claim for unappraisable interest (without a certain material interest), therefore the court defines the amount of the due fee and it can vary between 30 BGN and 80 BGN per claim – Article 71 (1) of CCP in connection with Article 3 and 4 of the Tariff for state fees collected by the courts under the Civil Procedure Code from 2008.<sup>81</sup> Court fees for a claim with a certain material interest is 4% of the amount of the claim, but not less than 50 BGN.<sup>82</sup>
- Expertise remuneration - depending on complexity and scope of the tasks – between 500 and 1000 BGN, or even higher;
- Advocate fees – for claims for unappraisable interest the minimum fee is 300 BGN<sup>83</sup>, in practice however it varies and could be much higher than that and can reach up to a few thousands BGN. For claims with a certain material interest the exact amount of advocate fee depends on the amount of the claim – the higher the latter is, the higher advocate fee is.<sup>84</sup>
- Costs for publishing<sup>85</sup> – they depend on the media and the size of the publication, and may vary between 10 and 30 BGN.

#### **b. Loser Pays Principle (and exceptions from it)**

Loser Pays principle is applicable to civil proceedings, including collective action ones, as per the Bulgarian law in force.

According to Article 78 of CCP, the fees paid by the plaintiff, the costs of the proceeding, and the fees for one lawyer, if any, are paid by the defendant commensurate to the portion of the action granted. The defendant, too, has the right of payment of the costs incurred commensurate to the portion of the action dismissed. If the defendant has not provided an occasion for institution of the case or if the defendant admits the claim, the costs shall be awarded against the plaintiff.

The legal provision allows a decrease of lawyers' fees, namely if the fees paid by the party are excessive considering the actual legal and factual complexity

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<sup>80</sup> This opinion is shared by Chernev, Silvi Collective Actions, Trud i pravo, <http://www.trudipravo.bg/mesechni-spisania/mesechno-spisanie-targovsko-i-obligacionno-pravo/menuconttkp1/240-proizvodstvo-po-kolektivni-iskove> [Last visited on 15.05.2017] as well as by Markova, Tatyna Collective Actions – *ex-ante* analysis of their application in Bulgaria, Economic and Social Alternatives, 2015/1, s. 147.

<sup>81</sup> Тарифа за държавните такси, които се събират от съдилищата по Гражданския Процесуален Кодекс (ГПК) [Tariff for state fees collected by the courts under the Civil Procedure Code promulgated in State Gazette 22/28.02.2008, the last amendment promulgated in State Gazette 35/02.05.2017]

<sup>82</sup> Tariff for state fees collected by the courts under the Civil Procedure Code from 2008 [Тарифа за държавните такси, които се събират от съдилищата по Гражданския Процесуален Кодекс (ГПК)] – promulgated in State Gazette 22/28.02.2008, the last amendment promulgated in State Gazette 35/02.05.2017

<sup>83</sup> Ordinance of the Supreme Bar Council No 1 from 2004 on the minimum advocate fees

<sup>84</sup> Article 7 (2) of Ordinance of the Supreme Bar Council No 1 from 2004 on the minimum advocate fees – promulgated in State Gazette 64/23.07.2004, the last amendment promulgated in State Gazette 84/25.10.2016

<sup>85</sup> Article 382 (2) of CCP.

of the case. In such case the court, acting on a motion by the opposing party, may award a lower amount of the costs in this part, but not less than the minimum amount set per Article 36 of the Bar Act.

Parties in financial hardship are entitled to a Legal Aid<sup>86</sup>. If the claim of a recipient of legal aid is granted, the lawyers' fees paid shall be awarded in favour of the National Legal Aid Office commensurate to the portion of the action granted. In the cases of a judgment adverse to the recipient of legal aid, the said recipient shall owe costs commensurate to the portion of the action dismissed.

## **5. Lawyers' Fees**

### **Availability (or not) of contingency fees and their conditions**

The Bulgarian legal system allows conditional fee arrangements between a lawyer and a client, except for cases involving non-material interest (such as collective action for injunction) – Article 36 (4) of the Bar Act.

However according to the established Bulgarian case law<sup>87</sup>, conditional fees are not recoverable as they depend on the outcome of the case and, hence, have not been paid up by the end of the trial, e.g. by the end of the final court hearing before the court decision<sup>88</sup>.

## **6. Funding**

### **a. Availability of funding**

Based on the information collected for the purposes of the current study, it can be summarized that collective actions for protection of collective interest are funded by various sources, namely by the state budget (collective actions brought by the Commission for Consumer Protection), private donations<sup>89</sup>, own financial resources of plaintiffs, or state funding for qualified consumer organisations.<sup>90</sup>

### **b. Origins of funding (public, private, third party)**

As mentioned above, there are various sources of funding – state budget, private donations, own financial resources of plaintiffs or state funding.

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<sup>86</sup> Requirements are set in Article 83 (2) of CCP.

<sup>87</sup> Interpretation Ruling № 6 / 06.11.2013 Interpret. Case № 6 / 2012 General Assembly of Civil and Commercial Divisions of the Supreme Court of Cassation

<sup>88</sup> See Article 80 of CCP "The party who has moved for the award of costs shall present to the court a list of costs not later than before the close of the last hearing in the court of the relevant instance. Failing this, the said party shall not have the right of appeal against the judgment in its part concerning the costs."

<sup>89</sup> See the website of the Association for Legal Aid of Consumers – <http://zastitanapotrebitelite.com/%D0%BD%D0%B0%D0%BF%D1%80%D0%B0%D0%B2%D0%B8-%D0%B4%D0%B0%D1%80%D0%B5%D0%BD%D0%B8%D0%B5/> [last visited on 20.05.2017]

<sup>90</sup> See Ordinance #RD-16-1117/01.10.2010 on conditions and rules of providing financial resources to consumers' organisation by the state [Наредба № РД-16-1117 от 1 Октомври 2010 г. за Условията и Реда за предоставяне на финансови средства на представителните сдружения на потребителите от държавата (Загл. Изм. – ДВ, Бр. 5 от 2012 Г.)]

**c. Conditions and frequency of resort to third party funding**

No relevant information on third party funding has been found.

**d. Control of funders (Courts/Legislators/Self-regulation)**

No relevant information on control over third party funding has been found.

The system for control of spending the budget funding received by consumer organisations is regulated in the Chapter 5 of the Ordinance #RD-16-1117/01.10.2010.<sup>91</sup>

**e. Claimant-Funder relationship**

No relevant information on the relationship between claimants and third party-funders has been found.

**7. Enforcement of collective actions/settlements**

**a. Framework for enforcement**

The general provisions of the Code of Civil Procedure (Part V of CCP) are applicable, namely:

- Title 2 "Enforcement of Pecuniary Receivables" – for compensatory redress;
- Title 2 "Enforcement of Non-Pecuniary Receivables", Chapter 45 "Performance of Specific Act" – for injunctive redress. According to Article 527 of CCP, where the act cannot be performed by another person but depends exclusively on the will of the execution debtor, the enforcement agent, acting on a motion by the execution creditor, shall compel the said debtor to perform the act, imposing thereon a fine not exceeding BGN 200. If even after that the execution debtor fails to perform the act, the enforcement agent shall impose thereon successive new fines up to the same amount.

**b. Efficient enforcement of compensatory/ injunctive order**

The level of efficiency of enforcement of orders for protection of collective interests seems to be the same as the one of the other orders.

**c. Cross border enforcement**

Legal Framework is in the Code of Civil Procedure:

- Chapter 57 "Recognition of and Admission to Enforcement of Judgments and Judicial Acts Subject to Operation of Community Law;
- Chapter 58 "Enforcement Pursuant To Regulation (EC) No 1896/2006 of The European Parliament and of The Council creating a European Order for Payment Procedure.

**8. Number and types of cases brought/pending**

During this study no information on a National Register of Collective Actions existing has been found<sup>92</sup>.

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91 See below in the chapter for Special Collective Redress Mechanisms.

Since 2016 the Annual Statistical Reports prepared and published by the Supreme Judicial Council contain data also on collective actions.<sup>93</sup> For instance, the Annual Report for 2016 states the district courts in Bulgaria heard in 2016 altogether 31 collective actions, out of which in 2 cases the claims were fully granted, in 10 cases – partially granted, and in 2 case the claims were dismissed, however, in the report, it is not specified for which type of rights protection was sought, namely consumer interests, labour rights, or other.

## **9. Impact of the Recommendation/Problems and Critiques, including**

### **a. Impact of the collective mechanism (or lack of) on behaviour/ policy of stakeholders (direct/ indirect, economic/social impact)**

The impact is visible and positive. For the last few years since the collective redress mechanism was introduced in Bulgarian legislation, quite a few collective actions have been brought and the public awareness of this redress mechanism seems to be raised. The collective actions proceedings are mainly for the protection of collective consumers' interests and only few proceedings are for the protection of collective interest in areas other than consumer protection.

When it comes to consumer collective redress, it is noticeable that the number of actions brought by consumers' organisations is significantly lower than the number of those initiated by the Commission for Consumer Protection, mainly due to hindering effect of bearing costs of proceedings as well as the lack of resources for organising and successfully managing such complex proceedings.

The collective redress mechanism also has an impact on businesses, although a more indirect one. The requirement for a public announcement of the collective action brought, along with a corrective statement, encourages the infringers to voluntarily stop the unlawful behaviour (for instance, to cease the unfair practice or remove the unfair term) in order to prevent a harm to their good reputation in the business world. Although not many yet, such situations of proactive rectification can be found in Bulgarian practice, and they are revealing the impact which collective redress mechanisms have on behaviour of businesses.

### **b. Incompatibilities with the Recommendation's principles**

Based on the information collected for the purposes of the current report, a conclusion can be drawn that Bulgarian legislation in force is to a great extend compliant with the principles of Recommendation from 2013 with few exceptions:

- There does not seem to exist a National Register of Collective Actions;

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<sup>92</sup> There is an electronic register of courts acts, maintained by the Supreme Judicial Council – this can be found here <http://legalacts.justice.bg/> [last visited on 20.05.2017], however not all collective actions seem to be included in it. Additionally, the Commission for Consumer Protection is working on its own register of collective actions brought by the Commission (it is still under construction and not yet functional - <https://www.kzp.bg/registar-kolektivni-iskove> [last visited on 20.05.2017]).

<sup>93</sup> No data on collective actions was included in the report for previous year. This data seemed to be "hidden" in the category "other cases". Statistical data can be found here – <http://www.vss.justice.bg/page/view/1082> [last visited on 20.05.2017].



- There is a room for improvement in regards of the requirement for the collective redress procedures not to be prohibitively expensive. In general, the costs of collective actions procedures in Bulgaria are high, which seems to be an obstacle for bringing new collective actions, especially by consumer organisations.

- The lack of court chambers specialized in collective redress procedures can be considered as a disadvantage which appears to decrease the efficient case management as some judges are not very familiar with the specifics of this procedure.

**c. Problems relating to access of justice/fairness of proceedings including**

**Restrictions on access to justice negatively affecting collective redress**

Only the organisations for which the court has *ex officio* verified the ability to seriously and in good faith protect the injured party and bear the costs of the proceedings, including expenses, can bring collective actions. The decision is left to the courts discretion, and may create undesirable procedural obstacles for some organisation to prove their capacity and resource to bring such actions and successfully manage the cases.

**Time and burden of collective actions on courts and parties compared to non-collective litigation**

The collective redress procedure has specifics which require more time for preparing and managing the case both on the side of the parties involved and the judge hearing the case.

**Risks of and examples for abusive litigation**

Such risks exist in Bulgarian practice, however currently only theoretically. No information on abusive litigations has been found.

**Effective right to obtain compensation**

The right on compensation for damage on collective interest is acknowledged by general rules on collective redress mechanism. Due to a lack of sufficient case law on collective compensatory redress however it is difficult to assess the effectiveness of this right.

## II. Sectoral Collective Redress Mechanism(s)

### A. Injunctive Collective Redress – Article 186-187 of CPA

#### 1. Scope/ Type

##### a. Sectoral

The approach is sectoral. The provisions regarding collective redress mechanisms for injunctive relief are applicable for infringements of legal rules on any of the following:<sup>94</sup>

- consumer contracts negotiated away from business premises and distance consumer contracts, unfair business to consumer commercial practices, sale of consumer goods and associated guarantees, unfair terms in consumer contracts, timeshare, long-term holiday product, resale and exchange contracts (Article 186 (2) p. 1 of CPA);
- package travel, package holidays and package tours (Article 186 (2) p.2 of CPA);
- television broadcasting activities (Article 186 (2) p.3 of CPA);
- advertising of medicinal products for human use (Article 186 (2) p.4 of CPA);
- electronic commerce (Article 186 (2) p.5 of CPA);
- consumer credit (Article 186 (2) p.6 of CPA);
- distance marketing of consumer financial services (Article 186 (2) p.7 of CPA);
- services(Article 186 (2) p.8 of CPA); or
- ***any other legislation that protects the interests of consumers (Article 186 (2) p. 9 of CPA).***<sup>95</sup>

##### b. Injunctive or compensatory or both

Articles 186-187 of CPA are regulating **injunctive** collective redress – namely for the **cessation or prohibition of actions or commercial practices in detriment of collective interests of consumers.**

There are attempts in Bulgarian legal literature for defining the term “collective interest of consumers”. Some authors consider it as an abstract interest of consumers in fair functioning of the market and compliance with legal provisions aimed at securing such fairness.<sup>96</sup>

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<sup>94</sup> Basically in Article 186 (1) p. 1-8 of CPS are listed the acts transposing to the national legislation the provision of the EU acts listed in the Annex I to the Injunction Directive.

<sup>95</sup> Some legal authors point out that Bulgarian legislator has not limited the application of the injunctive collective redress only to infringements of the acts listed in the Annex I to the Injunction Directive – see Markov, Metodi “Collective actions for consumer protection”, in “Society and Law”, 2007/9, p. 13.

<sup>96</sup> Varadinov, Ognyan Lukanov Unfair Commercial Practices in transactions between trader and consumer: Analysis of Chapter IV, Section IV consumer Protection Act, 2014, p. 232.

Furthermore, legal authors also share the view that the detriment of consumers' interest exists not only when consumers have actually suffered damage, but also in the cases when their interests have been put at risk.<sup>97</sup>

Both Bulgarian case law and legal literature accepts that this action can also take a form of a **claim for a declaratory judgment**, for instance for declaring of certain unfair contract terms as null and invalid.<sup>98</sup> In support of this view is also the procedural rule of Article 379 (2) of CCP explicitly allowing collective actions for declaratory judgement.<sup>99</sup>

## 2. Procedural Framework

### a. Competent Court

The court competent to hear the action is the district court<sup>100</sup> in the place where the infringement was committed or the one in the place of the defendant's registration – Article 190 of CPA.<sup>101</sup>

### b. Standing

Collective action for injunction can be brought by any of the following:

- Qualified consumer protection organisations<sup>102</sup> which are registered in Bulgaria.<sup>103</sup> According to an opinion in the legal literature, the procedural legitimation of those organisations is established by the law, and it does not depend on the indication of more than two identified persons whose

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<sup>97</sup> Varadinov, Ognyan Lukanov Unfair Commercial Practices in transactions between trader and consumer: Analysis of Chapter IV, Section IV consumer Protection Act, 2014, p. 233.

<sup>98</sup> Decision № 207/24.01.2012 Commercial Case № 580/2011 the Supreme Court of Cassation, II Commercial division; Decision № 160/15.12.2011 Commercial Case № 1072/2010 the Supreme Court of Cassation, I Commercial division. See also Sukareva, Zlatka Consumer Law, 2015, p. 232.

<sup>99</sup> Some authors disagree with the opinion that this provision is applicable to collective action under CPA, hence although allowed by general procedural rules, collective actions for declaratory judgment are not applicable for protection of collective consumers interests – Varadinov, Ognyan Lukanov Unfair Commercial Practices in transactions between trader and consumer: Analysis of Chapter IV, Section IV consumer Protection Act, 2014, p. 234 and p.237.

<sup>100</sup><sup>100</sup> According to Article 380 (1) of CCP. See also Chernev, Silvi Collective Actions, Trud i pravo, <http://www.trudipravo.bg/mesechni-spisania/mesechno-spisanie-targovsko-i-obligacionno-pravo/menuconttkp1/240-proizvodstvo-po-kolektivni-iskove> [Last visited on 15.05.2017]; Stalev, Zhivko et al. Bulgarian Civil Procedure Law, 2012, p. 774.

<sup>101</sup> Ruling № 1546 / 12.07.2013 Appeal Commercial Case № 790/2013 the Court of Appeal – Plovdiv; the court cannot decide *ex officio* that it has not territorial competence to hear the case – Ruling № 769 / 29.04.2011 Appeal Civil Case № 1213/2011 the Court of Appeal – Sofia; in case of unfair contract terms – the infringement is committed (thus competent is the district court) in the place, where the standard T&Cs have been drafted/approved, not in the places where consumer contracts referring to these T&Cs have been concluded – Ruling № 2725 / 20.09.2013 Civil Case № 693/2013 the District Court – Plovdiv; if the place where the infringement was committed cannot be identified, the competent is the court of the defendant's registration – Ruling № 185 / 04.03.2014 Commercial Case № 587/2014 the Supreme Court of Cassation, I Commercial division.

<sup>102</sup> The current list can be found here <http://www.mi.government.bg/bg/library/spisak-na-kvalificiranite-organizacii-v-republika-balgariya-koito-imat-praven-interes-da-predyavyavat-43-c293-m0-1.html> – [last visited on 20.05.2017]

<sup>103</sup> See Markov, Metodi "Collective actions for consumer protection", in "Society and Law", 2007/9, p.14.

rights and interests as consumers have been affected or injured by the infringement;<sup>104</sup>

- The Commission for Consumer Protection.<sup>105</sup> The Commission itself, in its capacity as a state body established by law to protect group interests belonging to a certain category of consumers, is the plaintiff, not the consumers;<sup>106</sup>
- Qualified consumer protection organisation from any other member state of the EU, if an infringement of collective interests of consumers committed in Bulgaria have effects also on its territory and it is included in the list of qualified organisations prepared by the European Commission published in the Official Journal of the EU.<sup>107</sup>

### **c. Availability of Cross Border collective redress**

According to Article 186a of CPA, an action for injunctive collective redress can also be brought by a qualified consumer protection organisation from any other member state of the EU, provided that an infringement of collective interests of consumers committed in Bulgaria has effects also on its territory, under two conditions:

- The infringement affects consumers' interests, protection of which is one of the goals of the organisation;
- The organisation is included in the list of qualified bodies prepared by the European Commission and published in the Official Journal of the EU.

Bulgarian legal practice however does not seem to have experienced so far any such cross-border collective redress proceedings.

### **d. Opt In/ Opt Out**

#### **Principal availability of either/or/both options?**

The general procedural rules of the Chapter 33 "Collective actions" of CCP are applicable.<sup>108</sup>

Furthermore, some legal authors state that only the entities with right of standing can exercise Opt In/Opt Out rights, not individual consumers, as the latter cannot anyway be constituted as plaintiffs in the proceedings under Article 186 of CPA.<sup>109</sup>

#### **Opt-out restricted to in-jurisdiction claimants?**

No such restrictions exist.

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104 Gradinarova, Tanya The procedural legitimation in the class action in Bulgarian civil proceedings, Academic papers, University-Russe, 2015, volume 54, series 7, p. 73

105 According to Article 186 (3) of CPA

106 Ruling № 193 / 19.04.2017 Commercial Case № 400 /2017 the Supreme Court of Cassation, I Commercial division, which refers to Decision № 207/24.01.2012 Commercial Case № 580/2011 the Supreme Court of Cassation, II Commercial division.

107 According to Article 186a (1) of CPA

108 See above Part II "General Collective Redress Mechanism"

109 Varadinov, Ognyan Lukanov Unfair Commercial Practices in transactions between trader and consumer: Analysis of Chapter IV, Section IV consumer Protection Act, 2014, p. 240.

### **If opt-out, is it justified by the sound administration of justice?**

As stated earlier, the dispositive principle is one of the fundamental principles of Bulgarian Civil Procedure Law – Article 6 of CCP. Persons can freely decide whether to commence a court proceeding for protection of their civil law rights, define the scope of protection of their rights, or even terminate the civil court case (or their participation in it) at any time. Therefore, the provision of Article 383 (1) p. 2 of CCP (Opt Out option) can be considered compliant with the main principles of Civil Procedural Law.

### **Specific measures related to the fact that affected persons are not identifiable**

The general procedural rules of the Chapter 33 “Collective actions” of CCP are applicable.<sup>110</sup>

#### **e. Main procedural rules**

##### **Admissibility and certification criteria**

The general procedural rules of the Chapter 33 of CCP are applicable, namely the court shall *ex officio* verify the ability of the person or persons who have brought the action to seriously and in good faith protect the injured parties and bear the costs of the proceedings, including expenses.

Some legal authors however consider these rules of general procedural law as inapplicable to collective actions under Article 186 of CPA as such can be brought only by qualified organisations (either national or from other EU member states), which have already been tested and found by the Ministry of Economy to be serious, reliable and capable for performing activities to protect consumers interests.<sup>111</sup> Furthermore, these organisations are receiving state funding for their activities, including for bringing collective actions for protection of consumers interests.<sup>112</sup>

##### **Single or Multi-stage process**

The general procedural rules of the Chapter 33 of CCP are applicable i.e. it is a multi-stage process and the whole collective action for injunctive relief can in general go through **three instances** - first, appeal and cassation.

##### **Case-management and deadlines**

Apart from the general procedural deadlines<sup>113</sup>, the Code of Civil Procedure contains special provisions on deadlines specific for the collective actions, for instance the deadline for Opt Out/Opt In – Article 382 (2) of CCP.

##### **Expediency (particularly in injunctive cases)**

Article 310 of CCP provides a summary procedure for cases of ascertainment and cessation of infringement of rights under the Consumer Protection Act (injunction).

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<sup>110</sup> See above Part II “General Collective Redress Mechanism”

<sup>111</sup> Varadinov, Ognyan Lukanov Unfair Commercial Practices in transactions between trader and consumer: Analysis of Chapter IV, Section IV consumer Protection Act, 2014, p. 236.

<sup>112</sup> See below about the funding.

<sup>113</sup> For instance, one week for submission by the defendant to take a stand to the statement of action (Article 312 (2) of CCP), fortnight – for lodging an appeal against the decision of the first instance court (Article 259 (1) of CCP).

The procedural rules require that on the day of receipt of the statement of action, the court verifies the conformity thereof and the admissibility of the action. The court instructs the plaintiff to supplement, clarify or eliminate the contradictions in the allegations, namely whichever of them are obscure, deficient, or imprecise – Article 311 of CCP.

According to Article 312 of CCP, on the day of receipt of the answer of the defendant, or upon reaching the time limit for receiving such an answer, the court sitting in a closed session (in camera) issues an order in which it:

1. schedules a hearing of the case for a date within three weeks;
2. prepares a written report on the case;
3. invites the parties to reach a settlement and explains thereto the advantages of the various options for reaching a voluntary resolution of the dispute;
4. pronounces on the motions for evidence, thus only admitting the evidence which is relevant and admissible;
5. determines an amount and a time limit for depositing of the costs of evidence collection.

The court serves upon the parties a duplicate copy of the above-mentioned order, and in addition to the said duplicate copy serves upon the plaintiff a duplicate copy of the defendant's written answer as well as the evidence attached thereto, and instructs that the parties within one week take a stand to the instructions given and the report on the case and undertake the relevant procedural steps. The court also advises the parties on the consequences of non-compliance with the instructions – Article 312 (2) of CCP. Where the parties fail to comply with the instructions of the court within the time limit set, the parties forfeit the possibility to do so later, unless the omission is due to special unforeseen circumstances (Article 313 of CCP).

The court publishes its decision with the reasoning within two weeks after the hearing during which the examination of the case was concluded (Article 316 of CCP).

### **Evidence/discovery rules**

General procedural rules are applicable – the Chapter 14 "Evidence" of CCP.

### **Interim measures**

The general procedural rules of the Chapter 33 "Collective actions" of CCP are applicable.<sup>114</sup>

### **Court directed settlement option during procedure**

The general procedural rules of the Chapter 33 "Collective actions" of CCP are applicable.<sup>115</sup> The court which the action has been brought before is obliged to direct the parties to a settlement and explain thereto the advantages of considering any options for reaching a voluntary resolution of the dispute (Article 384 (1) of CCP).

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114 See above Part II "General Collective Redress Mechanism"

115 See above Part II "General Collective Redress Mechanism"

Additionally, a special provision in the summary procedure (Article 315 (1) of CCP) requires that the court, during the hearing for examination of the case, re-invite the parties to reach a settlement.

### **In case of out of court settlements: judicial control**

The general procedural rules of the Chapter 33 "Collective actions" of CCP are applicable.<sup>116</sup>

## **3. Available Remedies**

### **a. Injunctions**

According to Article 187 of CPA, when it is found that a particular commercial practice or action constitutes an infringement under Article 186 of CPA, the court may:

- Obligate the manufacturer, the importer, the trader and the supplier to publish, in an appropriate manner and at their expense, the judgment or part thereof and/or make a public corrective statement in order to eliminate the effect of the infringement;
- Order the manufacturer, the importer, the trader and the supplier to stop the unfair commercial practice or remove the unfair terms from the contract within a certain period;
- Make other appropriate measures for termination of the infringements, on the request of the persons under Article 186 (1) of CPA.
- Moreover, the court is not bound to accept the measures for protection requested by the plaintiff. Considering the specifics of the case and after taking into consideration the stand of the defendant, the court may as well order other measures which ensure adequate protection of the harmed interest, i.e. to act *ex officio* – Article 385 (4) of CCP.

### **b. Possibility to seek an injunction and compensation within one single action**

It is possible for the plaintiff to bring several actions against the same defendant by a single statement of action if the said actions fall within the competence of the same court and are subject to examination in the procedure of the one and same type as per the general procedural rules (Article 210 (1) of CCP). When the actions brought are not subject to examination under the one and same type of procedure or the court determines that the joint examination of the said actions will be considerably impeded, the court can decree a dis-joinder of the actions – Article 201 (2) of CCP.

### **c. Possibility to rely in an injunction in separate follow-on individual or collective damages actions**

It is possible to rely on injunction decision in the follow-on actions for damages in accordance with the general procedural rules for collective redress.<sup>117</sup>

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116 See above Part II "General Collective Redress Mechanism"

117 See Civil case 4247/2014 of City Court – Sofia Civil Case (injunction) and the follow-on № 16588/2015 City Court – Sofia (damages on collective interests).

#### **d. Limitation periods**

General rules are applicable – limitation period is 5 years.<sup>118</sup>

### **4. Costs**

#### **a. Basic rules governing costs and scope of the rules**

Costs consist of:

- Court fees – the injunction action can be considered as a claim for unappraisable interest (without a certain material interest), therefore the court defines the amount of the due state fee and it can vary between 30 BGN and 80 BGN per claim – Article 71 (1) of CCP in connection with Article 3 and 4 of the Tariff for state fees collected by the courts under the Civil Procedure Code from 2008.<sup>119</sup> These rules are applicable regardless of the plaintiff – the same court fees are due by the consumer protection organisations bringing collective action for injunctive relief as well as by the Commission for Consumer Protection.<sup>120</sup>
- Expertise remuneration - depending on complexity and scope of the tasks – between 500 and 1000 BGN, or even higher;
- Advocate fees – for claims for unappraisable interest the minimum fee is 300 BGN<sup>121</sup>, in practice it varies and could be much higher than that and can reach up to a few thousands BGN. The Commission for Consumer Protection is using the services of its own legal counsellors, therefore is not bearing the additional financial burden of advocate fees.<sup>122</sup>
- Costs for publishing<sup>123</sup> – they depend on the media and the size of the publication, and may vary between 10 and 30 BGN.

#### **b. Loser Pays Principle**

Loser Pays principle is applicable to civil proceedings as per the Bulgarian law in force. The general rules of CPP are applicable.

### **5. Lawyers' Fees**

#### **Availability (or not?) of contingency fees and their conditions**

The Bulgarian legal system allows conditional fee arrangements between a lawyer and a client, except for cases involving non-material interest (such as collective action for injunction) – Article 36 (4) of the Bar Act.

However according to the established Bulgarian case law<sup>124</sup>, conditional fees are not recoverable as they depend on the outcome of the case and, hence,

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<sup>118</sup> Article 110 of the Obligations and Contracts Act.

<sup>119</sup> Тарифа за държавните такси, които се събират от съдилищата по Гражданския Процесуален Кодекс (ГПК) [Tariff for state fees collected by the courts under the Civil Procedure Code promulgated in State Gazette 22/28.02.2008, the last amendment promulgated in State Gazette 35/02.05.2017]

<sup>120</sup> Ruling № 937 / 25.11.2011 Commercial Case № 825 /2011 the Supreme Court of Cassation, II commercial division; see also Markova, Tatyna Collective Actions – *ex-ante* analysis of their application in Bulgaria, Economic and Social Alternatives, 2015/1, s. 149

<sup>121</sup> Ordinance of the Supreme Bar Council No 1 from 2004 on the minimum advocate fees

<sup>122</sup> Markova, Tatyna Collective Actions – *ex-ante* analysis of their application in Bulgaria, Economic and Social Alternatives, 2015/1, s. 149

<sup>123</sup> Article 382 (2) of CCP.



have not been paid up by the end of the trial, e.g. by the end of the final court hearing before the court decision<sup>125</sup>.

## **6. Funding**

### **a. Availability of funding**

Based on the information collected for the purposes of the current study, it can be summarized that collective actions for protection of consumers' interest are funded by various sources – state budget (for the actions brought by the Commission for Consumer Protection), private donations<sup>126</sup>, own financial resources of consumer organisations, and state funding.

The state funding is regulated by the Ordinance #RD-16-1117/01.10.2010 on conditions and rules of providing financial resources to consumers' organisation by the state<sup>127</sup>. According to this act, consumer organisations that meet certain criteria (stated in Article 3 of the Ordinance) can obtain financial resource from the state budget in order to fund their activities, including protection of collective interests of consumers. For the current year 2017 the total budget secured by the Ministry of Economy for the funding activities of consumer protection organisations in Bulgaria is 70,000 BGN<sup>128</sup>.

Some legal authors, however, consider the availability of funding only as a theoretical option without actual practical effect.<sup>129</sup> Therefore the consumer protection organisations are reluctant to bring collective actions – the amount of expenses will surely be high, and the chances to get compensation – low.<sup>130</sup>

### **b. Origins of funding (public, private, third party)**

As mentioned above, there are various sources of funding – state budget (the actions brought by the Commission for Consumer Protection), private donations, own financial resources of consumer organisations, and state funding.

### **c. Conditions and frequency of resort to third party funding**

No relevant information on third party funding has been found.

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124 Interpretation Ruling № 6 / 06.11.2013 Interpret. Case № 6 / 2012 General Assembly of Civil and Commercial Divisions of the Supreme Court of Cassation

125 See Article 80 of CCP.

126 See the website of the Association for Legal Aid of Consumers – <http://zastitanapotrebitelite.com/%D0%BD%D0%B0%D0%BF%D1%80%D0%B0%D0%B2%D0%B8-%D0%B4%D0%B0%D1%80%D0%B5%D0%BD%D0%B8%D0%B5/> [last visited on 20.05.2017]

127 Наредба № РД-16-1117 от 1 Октомври 2010 г. за Условиата и Реда за предоставяне на финансови средства на представителните сдружения на потребителите от държавата (Загл. Изм. – ДВ, Бр. 5 от 2012 Г.)

128 Order #RD-16-299/02/03.2017 of the Minister of Economy – <https://www.mi.government.bg/bg/themes/sdrujeniya-na-potrebitelite-326-325.html> [last visited on 20.05.2017]

129 Markova, Tatyna Collective Actions – *ex-ante* analysis of their application in Bulgaria, Economic and Social Alternatives, 2015/1, s. 148.

130 Markova, Tatyna Collective Actions – *ex-ante* analysis of their application in Bulgaria, Economic and Social Alternatives, 2015/1, s. 148

#### **d. Control of funders (Courts/Legislators/Self-regulation)**

The system for control of spending the budget funding received by consumer organisations is regulated in the Chapter 5 of the Ordinance #RD-16-1117/01.10.2010. The consumer organisation must render an account of the spent resources and provide an annual report for its activities. These documents are reviewed by a Committee appointed by the Minister of Economy which prepares a report with suggestions for approval of certain expenditures of consumer organisations. Non-spent financial resources or resources spent in violation of the provisions of the Ordinance must be returned by consumer organisations to the budget of the Ministry.

#### **e. Claimant-Funder relationship**

No relevant information on the relationship between claimants and third party-funders has been found.

### **7. Enforcement of collective actions/settlements**

#### **a. Framework for enforcement**

The general provisions of the Code of Civil Procedure (Part V of CCP) are applicable.

#### **b. Efficient enforcement of compensatory/ injunctive order**

The level of efficiency of injunctive order for protection of collective consumers' interests seems to be the same as the one of the other order for performing of or refraining from acts – for each case of failure a fine is imposed to the debtor.

#### **c. Cross border enforcement**

Legal Framework is in the Code of Civil Procedure Chapter 57 and 58.<sup>131</sup>

### **8. Number and types of cases brought/pending**

In the course of this study no information on a National Register of Collective Actions existing has been found<sup>132</sup>.

Additionally, there does not seem to exist relevant statistical data about collective actions for protection of consumers' interests. The latter actions seem to be included/"hidden" under the statistical category "collective actions" in the Annual Statistical Reports, prepared and published by the Supreme Judicial Council.<sup>133</sup>

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131 See above Part II "General Collective Redress Mechanism"

132 There is an electronic register of courts acts, maintained by the Supreme Judicial Council – this can be found here <http://legalacts.justice.bg/> [last visited on 20.05.2017], however not all collective actions seem to be included in it. Additionally, the Commission for Consumer Protection is working on its own register of collective actions brought by the Commission (it is still under construction and not yet functional - <https://www.kzp.bg/registar-kolektivni-iskove> [last visited on 20.05.2017]).

<sup>133</sup> Statistical data can be found here – <http://www.vss.justice.bg/page/view/1082> [last visited on 20.05.2017]. For instance, the Annual Report for 2016 states the district courts in Bulgaria heard in 2016 altogether 31 collective actions, out of which in 2 cases the

Therefore preparing a comprehensive overview on completed/pending collective actions for injunctive relieve (Article 186 of CPA) in Bulgaria appears to be a challenge. Based on various sources<sup>134</sup> the following summary of collective actions has been prepared:<sup>135</sup>

<b>Legal basis</b>	<b>Article 186 CPA</b>	<b>Article 188 CPA</b>	<b>Article 189 CPA</b>
<b>Plaintiff</b>			
Commission for Consumer Protection	73	n/a	n/a
Bulgarian National Association Active Consumers	4	3	
Consumers Legal Aid Association - Plovdiv	8		
Federation of Consumers in Bulgaria	1	1	

## **9. Impact of the Recommendation/Problems and Critiques, including**

### **a. Impact of the collective mechanism (or lack of) on behaviour/ policy of stakeholders (direct/ indirect, economic/social impact)**

The impact is visible and positive. For the last few years since the collective redress mechanism was introduced in Bulgarian legislation, Bulgarian consumer organisations and the Commission for Consumer Protection have brought a few actions, and there is already an extensive case law on this matter. It is obvious though that the number of actions brought by consumers' organisations is significantly lower than the number of those initiated by the Commission, mainly due to hindering effect of bearing costs of proceedings as well as the lack of resources for organising and successfully managing such complex proceedings.

As mentioned above<sup>136</sup>, there is an impact also for businesses, although more indirect one.

### **b. Incompatibilities with the Recommendation's principles**

Based on the information collected for the purposes of the current report, a conclusion can be drawn that Bulgarian legislation in force is compliant to a great extent with the principles of Recommendation from 2013 with few exceptions:

- There does not seem to exist a National Register of Collective Actions;

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claims were fully granted, in 10 cases – partially granted, and in 2 case the claims were dismissed, however in the report it is not specified the type of rights which protection was sought, namely whether those were consumer interests, labour rights, or other.

<sup>134</sup> Such as the Annual Reports of the Commission for Consumer Protection, information found on the websites of qualified consumer protection organisations and in their annual reports, or information provided by some of the organisations.

<sup>135</sup> Data for the following periods – for the last three years (2014, 2015 and 2016) for the Commission; without time limits for any of the other plaintiffs.

<sup>136</sup> See above Part II "General Collective Redress Mechanism"

- There is a room for improvement in regards of the requirement for the collective redress procedures not to be prohibitively expensive. In general, the costs of collective actions procedures in Bulgaria are high, which seems to be an obstacle for bringing new collective actions, especially by consumer organisations.

- The lack of court chambers specialized in collective redress procedures can be considered as a disadvantage which appears to decrease the efficient case management as some judges are not very familiar with the specifics of this procedure.

**c. Problems relating to access of justice/fairness of proceedings including**

**Restrictions on access to justice negatively affecting collective redress**

Only the organisations for which the court has *ex officio* verified the ability to seriously and in good faith to protect the injured party and bear the costs of the proceedings, including expenses, can bring collective actions. Decision is left in courts discretion, and may create undesirable procedural obstacles for some consumer organisation for proving their capacity and resource to bring such actions and successfully manage the cases.

**Time and burden of collective actions on courts and parties compared to non-collective litigation**

The collective redress procedure has specifics which require more time for preparing and managing the case both on the side of the parties involved and the judge hearing the case.

**Risks of and examples for abusive litigation**

Such risks exist in Bulgarian practice, however currently only theoretically. No information on abusive litigations has been found.

**Effective right to obtain compensation**

Not applicable to the injunctive collective redress.

**B. Compensatory Collective Redress – Article 188 of CPA (group action)**

**1. Scope/ Type**

**a. Sectoral**

The approach is sectoral, namely the compensatory collective redress is applicable to all cases of damages to collective consumers' interests – Article 188 (1) of CPA.

**b. Injunctive or compensatory or both**

Article 188 of CPA is regulating **compensatory** collective redress – for damages to collective interests of consumers. In Bulgarian case law, it is clarified that the existence of several (or even a significant number) individual claims which are joint together only because the damage suffered by

individuals is identical does not represent a collective interest. A collective action for damages to the collective interest is not a claim for damages of each of the affected individuals, but of a certain group of injured parties, specified by the plaintiff in the statement of action.<sup>137</sup>

According to the case law, the provisions of the Chapter 33 "Collective Actions" of CCP are applicable also to the action based on Article 188 of CPA.<sup>138</sup>

## **2. Procedural Framework**

### **a. Competent Court**

The court competent to hear the action is the district court<sup>139</sup> in the place where the infringement was committed or the one in the place of the defendant's registration – Article 190 of CPA.<sup>140</sup>

### **b. Standing**

Any consumer association can initiate the procedure.

No requirement exists for it to be a qualified entity according to the Ordinance of the Minister of Economy. It can be organisation with long-lasting activities in the field of consumer protection or an organisation established *ad-hoc* for protection of a certain collective interest.<sup>141</sup>

### **c. Availability of Cross Border collective redress**

Cross-border collective redress seems to be available and admissible in accordance with the general rules of the Code of Civil Procedure. No special rules on its availability exist.

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<sup>137</sup> Decision № 198/02.10.2013 civil case № 1420/2012 the Supreme court of Cassation, III civil division; Ruling № 411/01.08.2016 commercial case № 754/2016 the Supreme court of Cassation, II commercial division.

<sup>138</sup> Ruling № 411/01.08.2016 commercial case № 754/2016 the Supreme court of Cassation, II commercial division

<sup>139</sup><sup>139</sup> According to Article 380 (1) of CCP. See also Chernev, Silvi Collective Actions, Trud i pravo, <http://www.trudipravo.bg/mesechni-spisania/mesechno-spisanie-targovsko-i-obligacionno-pravo/menuonttkp1/240-proizvodstvo-po-kolektivni-iskove> [Last visited on 15.05.2017]; Stalev, Zhivko et al. Bulgarian Civil Procedure Law, 2012, p. 774.

<sup>140</sup> Ruling № 1546 / 12.07.2013 Appeal Commercial Case № 790/2013 the Court of Appeal – Plovdiv; the court cannot decide *ex officio* that it has not territorial competence to hear the case – Ruling № 769 / 29.04.2011 Appeal Civil Case № 1213/2011 the Court of Appeal – Sofia; in case of unfair contract terms – the infringement is committed (thus competent is the district court) in the place, where the standard T&Cs have been drafted/approved, not in the places where consumer contracts referring to these T&Cs have been concluded – Ruling № 2725 / 20.09.2013 Civil Case № 693/2013 the District Court – Plovdiv; if the place where the infringement was committed cannot be identified, the competent is the court of the defendant's registration – Ruling № 185 / 04.03.2014 Commercial Case № 587/2014 the Supreme Court of Cassation, I Commercial division.

<sup>141</sup> Markova, Tatyna Collective Actions – *ex-ante* analysis of their application in Bulgaria, Economic and Social Alternatives, 2015/1, s. 145; Stalev, Zhivko et al. Bulgarian Civil Procedure Law, 2012, p. 774.

#### **d. Opt In/ Opt Out**

##### **Principal availability of either/or/both options?**

Bulgarian legislation allows both options, namely Opt In and Opt Out in the provision of Article 383 of CCP, which is applicable to all collective actions proceeding.<sup>142</sup>

##### **Conditions for either type (prescribed by law or discretion of the judge?)**

It is however doubtful whether the general procedural rule of Article 383 of CCP is completely applicable to proceedings under Article 188 of CPA aimed at compensation of damages on collective interests of consumers (of the whole class/group of affected consumers), and not to individual interests of any particular consumer. A question can be raised why the latter explicitly need to request participation in the collective redress proceeding (Opt In), having in mind they will not be granted individual compensation in this proceeding and their interest as a member of the affected consumer class are already represented in the case.

It would make more sense for affected consumers to Opt Out from the collective redress for damages and seek individual compensatory redress in a separate proceeding.

In conclusion, only the Opt Out option seems meaningful in the proceedings under Article 188 of CPA.

##### **Opt-out restricted to in-jurisdiction claimants?**

No such restrictions exist.

##### **If opt-out, is it justified by the sound administration of justice?**

The dispositive principle is one of the fundamental principles of Bulgarian Civil Procedure Law – Article 6 of CCP. Persons can freely decide whether to commence a court proceeding for protection of their civil law rights, define the scope of protection of their rights, or even terminate the civil court case (or their participation in it) at any time. Therefore, the provision of Article 383 (1) p. 2 of CCP (Opt Out option) can be considered compliant with the main principles of Civil Procedural Law.

##### **Specific measures related to the fact that affected persons are not identifiable**

The class of consumers affected needs to be defined in the legal claim without identifying each and every individual. The general rules on collective actions are applicable, namely the court hear in an open session (with summoning of the plaintiff and the defendant) all parties' observations on the circumstances determining the group of the persons affected and the manner of communication of the collective action to the public. – Article 382 (2) of CCP.

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142 See above Part II "General Collective Redress Mechanism"

## **e. Main procedural rules**

### **Admissibility and certification criteria**

The general procedural rules are applied - the court hearing the case verifies the admissibility of the claim, the regularity of the claim and additionally *ex officio* verifies the ability of the person or persons who have brought the action to seriously and in good faith protect the injured parties and bear the costs of the proceedings, including expenses.

### **Single or Multi-stage process**

It is a multi-stage process.

The whole collective action for compensatory relief can in general go through **three instances** – first, appeal and cassation. The cassation instance is excluded for civil law claims with an amount lower than 5,000 BGN – Article 280 (2) of CPP.

### **Case-management and deadlines**

The general procedural rules are applicable - apart from the general procedural deadlines<sup>143</sup>, the Code of Civil Procedure contains special provisions on deadline specific for the collective actions, for instance the deadline for Opt Out/Opt In – Article 382 (2) of CCP.

### **Expediency (particularly in injunctive cases)**

Article 310 of CCP provides a summary procedure only for cases of ascertainment and cessation of infringement of rights under the Consumer Protection Act (injunctive). Summary procedure is not applicable to actions for damages.<sup>144</sup>

### **Evidence/discovery rules**

General procedural rules are applicable – the Chapter 14 “Evidence” of CCP.<sup>145</sup>

### **Interim measures**

The general procedural rules of the Chapter 33 “Collective actions” of CCP are applicable.<sup>146</sup>

### **Court directed settlement option during procedure**

The general procedural rules of the Chapter 33 “Collective actions” of CCP are applicable.<sup>147</sup>

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<sup>143</sup> For instance, one week for submitting by the defendant to take a stand to the statement of action (Article 312 (2) of CCP), fortnight – for lodging an appeal against the decision of the first instance court (Article 259 (1) of CCP).

<sup>144</sup> See Sukareva, Zlatka Consumer Law, 2015, p. 221 referring to Ivanova, Ruzha Blagovest Punev, Silvi Chernev Commentary on the new Code of Civil Procedure, 2008, p. 518.

<sup>145</sup> See above Part II “General Collective Redress Mechanism”

<sup>146</sup> See above Part II “General Collective Redress Mechanism”

<sup>147</sup> See above Part II “General Collective Redress Mechanism”

### **In case of out of court settlements: judicial control**

The general procedural rules of the Chapter 33 “Collective actions” of CCP are applicable.<sup>148</sup>

### **3. Available Remedies**

Compensation for damage to collective consumers’ interests shall be granted to the plaintiff – consumer protection organisation. The latter shall be obliged to spend the compensation only for consumer protection purposes – Article 188 (5) of CPA.

In the previous version of Article 188 (enforced in 2005 and abrogated in 2008 with the new Code of Civil Procedure) it was stated that the collective interests of consumers were damaged when there was an infringement of the consumer protection legal acts under Article 186 of CPA, regardless of whether the injured party might have been established and the damage was or was not actually suffered or the interests of the consumers were only put at risk – Article 188 (2). According to Article 188 (3), in its previous version, the compensation for consumer detriment was to be determined by the courts in accordance with the requirement of fairness and justice. However, the latter two provisions have been abrogated by the new Code of Civil Procedure, entered into force in 2008. Nowadays, instead of compensation, consumers can seek damages which amount should be substantiated.<sup>149</sup> Therefore in the civil proceeding for damages of collective consumers interests the courts require that the amount of damages claimed per consumer be specified and supported with evidences, which creates a lot of procedural obstacles for collective actions and is criticized in the legal literature.<sup>150</sup>

#### **a. Type of damages**

The law provisions do not specify the type of damages that can be claimed in the collective compensatory action proceedings.

The case law seems to accept the view that both pecuniary and non-pecuniary damage can be sought in such proceedings depending on the specific facts and circumstances of each particular case.<sup>151</sup>

#### **b. Allocation of damages between claimants for compensatory claims/ distribution methods**

Should there be more than one plaintiff the compensation shall be granted jointly to all of them – Article 188 (4) of CPA.

#### **c. Injunctions**

Available in the proceeding based on Article 186 of CPA.

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<sup>148</sup> See above Part II “General Collective Redress Mechanism”

<sup>149</sup> Decision 25.04.2017 civil case № 16588/2015 the City Court – Sofia – the action based on Article 188 was dismissed because the plaintiff didn’t succeed in proving the amount of damages.

<sup>150</sup> See Sukareva, Zlatka Consumer Law, 2015, p. 234. Some legal authors even think the chances to get such compensation are equal to zero - Markova, Tatyna Collective Actions – *ex-ante* analysis of their application in Bulgaria, Economic and Social Alternatives, 2015/1, s. 146.

<sup>151</sup> Ruling № 411/01.08.2016 commercial case № 754/2016 the Supreme court of Cassation, II commercial division.



#### **d. Possibility to seek an injunction and compensation within one single action**

It is possible for the plaintiff to bring several actions against the same defendant by a single statement of action if the said actions fall within the competence of the same court and are subject to examination according to the procedure of the one and same type – Article 210 (1) of CCP. When the actions brought are not subject to examination under the one and same type of procedure or the court determines that the joint examination of the said actions will be considerably impeded, the court can decree a dis-joinder of the actions – Article 201 (2) of CCP.

#### **e. Possibility to rely in an injunction in separate follow-on individual or collective damages actions**

It is possible to rely on injunction decision in the follow-on actions for damages.<sup>152</sup>

The legal effect of court decision is regulated by the general provisions of the Chapter 33 of CCP.

#### **f. Limitation periods**

General rules are applicable – limitation period is 5 years.<sup>153</sup>

### **4. Costs**

#### **Basic rules governing costs and scope of the rules**

As mentioned earlier, some legal authors express regrets that Bulgarian legislator has failed to lay down special rules on fees due on collective claims. The fees set by the general rule will be impossibly high, and in practice, the applicability of the compensatory collective redress will be frustrated<sup>154</sup>.

- Costs consist of:
- Court fees – Court fees – 4% of the amount of the claim, but not less than 50 BGN.<sup>155</sup>
- Expertise remuneration – depending on complexity and scope of the tasks – between 500 and 1000 BGN, or even higher;
- Advocate fees – the minimum is 300 BGN<sup>156</sup>. The exact amount depends on the amount of the claim – the higher the latter is, the higher advocate fee is.<sup>157</sup>

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152 See Civil case 4247/2014 of City Court – Sofia Civil Case (injunction) and the follow-on № 16588/2015 City Court – Sofia (damages on collective interests).

<sup>153</sup> Article 110 of the Obligations and Contracts Act.

<sup>154</sup> This opinion is shared by Chernev, Silvi Collective Actions, *Trud i pravo*, <http://www.trudipravo.bg/mesechni-spisania/mesechno-spisanie-targovsko-i-obligacionno-pravo/menuonttkp1/240-proizvodstvo-po-kolektivni-iskove> [Last visited on 15.05.2017] as well as by Markova, Tatyna Collective Actions – *ex-ante* analysis of their application in Bulgaria, *Economic and Social Alternatives*, 2015/1, s. 147.

<sup>155</sup> Tariff for state fees collected by the courts under the Civil Procedure Code from 2008 [Тарифа за държавните такси, които се събират от съдилищата по Гражданския Процесуален Кодекс (ГПК)] – promulgated in State Gazette 22/28.02.2008, the last amendment promulgated in State Gazette 35/02.05.2017

<sup>156</sup> Ordinance of the Supreme Bar Council No 1 from 2004 on the minimum advocate fees

- Costs for publishing<sup>158</sup> – they depend on the media and the size of publication, and can vary between 10 and 30 BGN.

## 5. Lawyers' Fees

### Availability (or not?) of contingency fees and their conditions

The Bulgarian legal system allows conditional fee arrangements between a lawyer and a client, except for cases involving non-material interest (such as collective action for injunction) – Article 36 (4) of the Bar Act.

However according to the established Bulgarian case law<sup>159</sup>, conditional fees are not recoverable as they depend on the outcome of the case and, hence, have not been paid up by the end of the trial, e.g. by the end of the final court hearing before the court decision<sup>160</sup>.

## 6. Funding

### a. Availability of funding

Based on the information collected for the purpose of the current study, it can be summarized that collective compensatory actions for protection of consumers' interest are funded by various sources – own financial resources of consumer organisations, private donations<sup>161</sup> and state funding.

The state funding is regulated in the Ordinance #RD-16-1117/01.10.2010 on conditions and rules of providing financial resources to consumers' organisation by the state<sup>162</sup>. According to this act, consumer organisations that meet certain criteria (stated in Article 3 of the Ordinance) can obtain financial resource from the state budget in order to fund their activities, including protection of collective interests of consumers. For the current year 2017 the total budget secured by the Ministry of Economy for the funding activities of consumer protection organisations in Bulgaria is 70,000 BGN<sup>163</sup>.

Some legal authors, however, consider the availability of funding only as a theoretical option without actual practical effect.<sup>164</sup> Therefore the consumer

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<sup>157</sup> Article 7 (2) of Ordinance of the Supreme Bar Council No 1 from 2004 on the minimum advocate fees – promulgated in State Gazette 64/23.07.2004, the last amendment promulgated in State Gazette 84/25.10.2016

<sup>158</sup> Article 382 (2) of CCP.

<sup>159</sup> Interpretation Ruling № 6 / 06.11.2013 Interpret. Case № 6 / 2012 General Assembly of Civil and Commercial Divisions of the Supreme Court of Cassation

<sup>160</sup> See Article 80 of CCP.

<sup>161</sup> See the website of the Association for Legal Aid of Consumers – <http://zastitanapotrebite-lite.com/%D0%BD%D0%B0%D0%BF%D1%80%D0%B0%D0%B2%D0%B8-%D0%B4%D0%B0%D1%80%D0%B5%D0%BD%D0%B8%D0%B5/> [last visited on 20.05.2017]

<sup>162</sup> Ordinance #RD-16-1117/01.10.2010 on conditions and rules of providing financial resources to consumers' organisation by the state

<sup>163</sup> Order #RD-16-299/02/03.2017 of the Minister of Economy – <https://www.mi.government.bg/bg/themes/sdrujeniya-na-potrebite-lite-326-325.html> [last visited on 20.05.2017]

<sup>164</sup> Markova, Tatyna Collective Actions – *ex-ante* analysis of their application in Bulgaria, Economic and Social Alternatives, 2015/1, s. 148.

protection organisations are reluctant to bring collective actions – the amount of expenses will surely be high, the chances to get compensation – low.<sup>165</sup>

**b. Origins of funding (public, private, third party)**

As mentioned above, there are various sources of funding –private donations, own financial resources of consumer organisations and state funding.

**c. Conditions and frequency of resort to third party funding**

No relevant information on third party funding has been found.

**d. Control of funders (Courts/Legislators/Self-regulation)**

No relevant information on control over third party funding has been found.

The system for control of spending the budget funding received by consumer organisations is regulated in the Chapter 5 of the Ordinance #RD-16-1117/01.10.2010. The consumer organisation must render an account of the spend resources and provide an annual report for its activities. Those documents are reviewed by a Committee appointed by the Minister of Economy which prepares a report with suggestions for approval of certain expenditures of consumer organisations. Non-spent financial resources or resources spent in violation of the provisions of the Ordinance must be returned by consumer organisations to the budget of the Ministry.

**e. Claimant-Funder relationship**

No relevant information on the relationship between claimants and third party-funders has been found.

**7. Enforcement of collective actions/settlements**

**a. Framework for enforcement**

The general provisions of the Code of Civil Procedure (Part V of CCP) are applicable, namely Title 2 “Enforcement of Pecuniary Receivables”.

**b. Efficient enforcement of compensatory/ injunctive order**

The level of efficiency of compensatory order for damages on collective consumers’ interests seems to be the same as of the other orders for payment. Enforcement of such orders (for damages on collective consumers’ interests) does not seem to be known to Bulgarian legal practice, so it is difficult to speculate what issues may occur in such enforcement proceeding.

**c. Cross border enforcement**

Legal Framework is in the Code of Civil Procedure:

- Chapter 57 “Recognition of and Admission to Enforcement of Judgments and Judicial Acts Subject to Operation of Community Law;
- Chapter 58 “Enforcement Pursuant To Regulation (EC) No 1896/2006 of The European Parliament and of The Council creating a European Order for Payment Procedure.

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<sup>165</sup> Markova, Tatyna Collective Actions – *ex-ante* analysis of their application in Bulgaria, Economic and Social Alternatives, 2015/1, s. 148

## 8. Number and types of cases brought/pending

In the course of this study no information of a National Register of Collective Actions existing has been found.<sup>166</sup>

Additionally, there does not seem to exist relevant statistical data about collective actions for protection of consumers' interests. The latter actions seem to be included/"hidden" under the statistical category "collective actions" in the Annual Statistical Reports, prepared and published by the Supreme Judicial Council.<sup>167</sup>

Therefore preparing a comprehensive overview of completed/pending collective actions for compensatory relieve (Article 188 of CPA) in Bulgaria appears to be a challenge. Based on various sources<sup>168</sup> the following summary of collective actions has been prepared:<sup>169</sup>

Legal basis	Article 186 CPA	Article 188 CPA	Article 189 CPA
<b>Plaintiff</b>			
Commission for Consumer Protection	73	n/a	n/a
Bulgarian National Association Active Consumers	4	3	
Consumers Legal Aid Association - Plovdiv	8		
Federation of Consumers in Bulgaria	1	1	

## 9. Impact of the Recommendation/Problems and Critiques, including

### a. Impact of the collective mechanism (or lack of) on behaviour/policy of stakeholders (direct/indirect, economic/social impact)

It is noticeable that the number of collective actions for damages on collective consumer interests is not significant. The reason may lie in the higher court fees (4% of the amount claimed) or in the legislative change from 2008, which require the exact amount of damages to be substantiated.

<sup>166</sup> There is an electronic register of courts acts, maintained by the Supreme Judicial Council – can be found here <http://legalacts.justice.bg/> [last visited on 20.05.2017], however not all collective actions seem to be included in it. Additionally, the Commission for Consumer Protection is working on its own register of collective actions brought by the Commission (it is still under construction and not functional - <https://www.kzp.bg/registar-kolektivni-iskove> [last visited on 20.05.2017]).

<sup>167</sup> Statistical data can be found here - <http://www.vss.justice.bg/page/view/1082> [last visited on 20.05.2017]. For instance, the Annual Report for 2016 states the district courts in Bulgaria heard in 2016 altogether 31 collective actions, out of which in 2 cases the claims were fully granted, in 10 cases – partially granted, in 2 case the claims were dismissed, however in the report it is not specified the type of rights which protection was sought, namely whether these were consumer interests, or labour rights, or other.

<sup>168</sup> Such as the Annual Reports of the Commission for Consumer Protection, information found on the websites of qualified consumer protection organisations and in their annual reports, or information provided by some of the organisations.

<sup>169</sup> Data for the following periods - for the last three years (2014, 2015 and 2016) for the Commission; without time limits for all the other plaintiffs.

## **b. Incompatibilities with the Recommendation's principles**

Based on the information collected for the purposes of the current report, a conclusion can be drawn that Bulgarian legislation in force is compliant to a great extent with the principles of Recommendation from 2013 with few exceptions:

- There does not seem to exist a National Register of Collective Actions;
- There is a room for improvement in regards of the requirement for the collective redress procedures not to be prohibitively expensive. In general, the costs of collective actions procedures in Bulgaria are high, which seems to be an obstacle for bringing new collective actions, especially by consumer organisations.
- The lack of court chambers specialized in collective redress procedures can be considered as a disadvantage which appears to decrease the efficient case management as some judges are not very familiar with the specifics of this procedure.

## **c. Problems relating to access of justice/fairness of proceedings including**

### **Restrictions on access to justice negatively affecting collective redress**

Only the organisations for which the court has *ex officio* verified the ability to seriously and in good faith protect the injured party and bear the costs of the proceedings, including expenses, can bring collective actions. Decision is left in courts discretion, and may create undesirable procedural obstacles for some consumer organisation for proving their capacity and resource to bring such actions and successfully manage the cases.

### **Time and burden of collective actions on courts and parties compared to non-collective litigation**

The collective redress procedure has specifics which require more time for preparing and managing the case both on the side of the parties involved and the judge hearing the case.

### **Risks of and examples for abusive litigation**

Such risks exist in Bulgarian practice, however currently only theoretically. No information on abusive litigations has been found.

### **Effective right to obtain compensation**

As mentioned before, in the past according to the version of CPA provisions in force until 2008, when the compensation for consumer detriment should have been determined by the courts in accordance with the requirement of fairness and justice, it seemed to be easier to obtain compensation for harm on collective consumers' interest. Nowadays, instead of compensation consumers can seek damages (the amount of which should be substantiated), which creates a lot of procedural obstacles for collective compensatory actions.

## **C. Compensatory Collective Redress – Article 189 of CPA (representative action)**

Some legal authors do not qualify this action as a type of collective redress mechanism, but consider it as a means of individual redress very similar to joined individual civil cases.<sup>170</sup> This view appears to be reasonable; nevertheless for the sake of completeness this action for protection of multiple consumers' interests has been included in the current study.

A collective representative action can be filed provided that the following prerequisites are met:

- Consumers who have suffered damage are identified and their count is at least two;
- Individual damage suffered by consumers must have been caused by the same producer, importer, trader or retailer, as well as has to have derived from the same infringement;
- A consumer association must have explicitly been granted by consumers with a power-of-attorney for bringing a claim for damages and for litigation representation.
- This redress mechanism is aimed at collecting damages to individual interests of at least two identified consumers, represented in the litigation by a consumer association. The legal basis is Article 189 of CPA.

### **1. Scope/ Type**

#### **a. Sectoral**

The approach is sectoral, namely the compensatory redress is applicable to all cases of damages to two or more consumers – Article 189 (1) of CPA.

#### **b. Injunctive or compensatory or both**

Article 189 of CPA is regulating **compensatory** redress – for damages to multiple consumers.

### **2. Procedural Framework**

#### **a. Competent Court**

The court competent to hear the action is the district court<sup>171</sup> in the place where the infringement was committed or the one in the place of the defendant's registration – Article 190 of CPA.<sup>172</sup>

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<sup>170</sup> See Sukareva, Zlatka Consumer Law, 2015, p.220 and p. 228.

<sup>171</sup> According to Article 380 (1) of CCP. See also Chernev, Silvi Collective Actions, Trud i pravo, <http://www.trudipravo.bg/mesechni-spisania/mesechno-spisanie-targovsko-i-obligacionno-pravo/menuconttkp1/240-proizvodstvo-po-kolektivni-iskove> [Last visited on 15.05.2017]; Stalev, Zhivko et al. Bulgarian Civil Procedure Law, 2012, p. 774.

<sup>172</sup> Ruling № 1546 / 12.07.2013 Appeal Commercial Case № 790/2013 the Court of Appeal – Plovdiv; the court cannot decide *ex officio* that it has not territorial competence to hear the case – Ruling № 769 / 29.04.2011 Appeal Civil Case № 1213/2011 the Court of Appeal – Sofia; in case of unfair contract terms – the infringement is committed (thus competent is the district court) in the place, where the standard T&Cs have been drafted/approved, not in the places where consumer contracts referring to these T&Cs have been concluded –

## **b. Standing**

Any consumer organisation can initiate the procedure provided it has been granted with a power-of-attorney to bring the action on behalf of at least two identified consumers who have suffered damage by one and the same infringement. No requirement exists for it to be a qualified entity according to the Ordinance of the Minister of Economy.

## **c. Availability of Cross Border collective redress**

Cross-border collective redress seems to be available and admissible in accordance with the general rules of the Code of Civil Procedure. No special rules on its availability exist.

## **d. Opt In/ Opt Out**

### **Principal availability of either/or/both options?**

Bulgarian legislation allows both options, namely Opt In and Opt Out – Article 383 of CCP. However due to the specifics of the action under Article 189 of CPA, namely the action is brought on behalf of identified persons who granted a power of attorney to the organisation-plaintiff, only the Opt In option appears to be applicable in such proceeding.

### **Conditions for either type (prescribed by law or discretion of the judge?)**

The legal provisions prescribe some general requirements the parties should meet, namely “injured parties, organisations for protection of the injured persons, organisations for protection of the injured collective interest or organisation for protection against such infringements” (Article 383 (1) of CCP). In proceedings based on Article 189 of CPA relevant will be “injured parties” i.e. consumers who were affected by the same infringement and will join the proceeding for seeking a redress. It is up to the judge discretion to decide if a certain person or organisation is meeting the condition to join the proceeding, which raises in the legal literature some concerns about courts capability to respond to the even higher and more complex requirements for the role of the court in the collective actions proceedings.

### **Opt-out restricted to in-jurisdiction claimants?**

No such restrictions exist.

### **If opt-out, is it justified by the sound administration of justice?**

The Opt Out option does not seem to be applicable to a proceeding under the Article 189 of CPA due to its specifics.

### **Specific measures related to the fact that affected persons are not identifiable**

In this type of redress procedure the persons who suffered damage are identified – Article 189 (1) p. 1 of CPA.

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Ruling № 2725 / 20.09.2013 Civil Case № 693/2013 the District Court – Plovdiv; if the place where the infringement was committed cannot be identified, the competent is the court of the defendant’s registration – Ruling № 185 / 04.03.2014 Commercial Case № 587/2014 the Supreme Court of Cassation, I Commercial division.

## **e. Main procedural rules**

### **Admissibility and certification criteria**

Article 381 of CCP requires that the court hearing the case verifies the admissibility of the claim<sup>173</sup> and the regularity of the claim<sup>174</sup>. As this is not a collective action *per se*, the requirement for *ex officio* verification of the ability of the person or persons who have brought the action to seriously and in good faith protect the injured party and to bear the costs of the proceedings, will not be applicable to this action.

### **Single or Multi-stage process**

It is a multi-stage process.

The whole procedure can in general go through **three instances** – first, appeal and cassation. The cassation review is excluded for civil law claims below 5,000 BGN.

### **Case-management and deadlines**

The general procedural rules of CPP are applicable.<sup>175</sup>

### **Expediency (particularly in injunctive cases)**

Article 310 of CCP provides a summary procedure only for cases of ascertainment and cessation of infringement of rights under the Consumer Protection Act (injunction). Such procedure is not applicable to actions for damages.

### **Evidence/discovery rules**

General procedural rules are applicable – Chapter 14 “Evidence” of CCP.<sup>176</sup>

### **Interim measures**

According to Article 385 (2) (3) of CCP acting on a request by the plaintiff the court, hearing the case may rule on adequate interim measures for protection of the harmed interests. The ruling may be modified or vacated by the same court in case of any change of circumstances, errors, or omissions. The ruling is subject to appeal and cassation review, which do not prevent the enforcement of the ruling, unless the court competent to examine the appeal orders otherwise.

### **Court directed settlement option during procedure**

The general procedural rules of CPP are applicable.<sup>177</sup>

### **In case of out of court settlements: judicial control**

The general procedural rules of CPP are applicable.<sup>178</sup>

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<sup>173</sup> According to Article 130 of CCP where, upon verification of the statement of action, the court establishes that the action brought is inadmissible, the court shall return the statement of action.

<sup>174</sup> Regulated in Articles 127 and 128 of CCP – the statement of action must have certain content and attachments in order to be considered regular and processed for hearing.

<sup>175</sup> See above Part II “General Collective Redress Mechanism”

<sup>176</sup> See above Part II “General Collective Redress Mechanism”

<sup>177</sup> See above Part II “General Collective Redress Mechanism”



### **3. Available Remedies**

Compensation for damage shall be granted to consumers on whose behalf the action has been brought.

According to Article 387 of CCP, the court may decree that the compensation be credited to either an account of one of the plaintiffs or to a special account jointly disposable by all the plaintiffs or to a special account jointly disposable by the injured persons. The court may also obligate the persons who have brought the action to transfer the compensation to a special account jointly disposable by the injured persons, taking adequate measures to secure the execution of this obligation.

When the compensation is transferred to a special account jointly disposable by the injured persons, these can decide how to proceed with the compensation. If they are not able to organize themselves, they can ask the first-instance court to convene a General Meeting of the injured persons – Article 388 of CCP. The court orders a notice to be published in the form in which the bringing of the action has been published. The General Meeting of the injured persons is presided by the judge and may act if at least six injured persons present. The General Meeting of the injured persons elect a Committee to dispose of the assets on the special account.

#### **a. Type of damages**

The case law seems to accept the view that both pecuniary and non-pecuniary damage can be sought in such proceeding depending on the specific facts and circumstances of each particular case.<sup>179</sup>

#### **b. Allocation of damages between claimants for compensatory claims/ distribution methods**

The compensation will depend on the proven amount of the damage suffered by each individual consumer.

#### **c. Injunctions**

Available in the proceeding based on Article 186 of CPA.

#### **d. Possibility to seek an injunction and compensation within one single action**

It is possible for the plaintiff to bring several actions against the same defendant by a single statement of action if the said actions fall within the competence of the same court and are subject to examination in the procedure of the one and same type – Article 210 (1) of CCP. When the actions brought are not subject to examination under the one and same type of procedure or when the court determines that the joint examination of the said actions will be considerably impeded, the court can decree a dis-joinder of the actions – Article 201 (2) of CCP.

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<sup>178</sup> See above Part II “General Collective Redress Mechanism”

<sup>179</sup> Ruling № 411/01.08.2016 commercial case № 754/2016 the Supreme court of Cassation, II commercial division.

#### **e. Possibility to rely in an injunction in separate follow-on individual or collective damages actions**

It is possible to rely on injunction decision in the follow-on actions for damages

#### **f. Limitation periods**

General rules are applicable – limitation period is 5 years.<sup>180</sup>

### **4. Costs**

#### **Basic rules governing costs and scope of the rules**

Costs consist of:

- Court fees – Court fees – 4% of the amount of the claim, but not less than 50 BGN.<sup>181</sup>
- Expertise remuneration – depending on complexity and scope of the tasks – between 500 and 1000 BGN, could be even higher in some cases;
- Advocate fees – the minimum is 300 BGN<sup>182</sup>. The exact amount depends on the amount of the claim – the higher the latter is, the higher advocate fee is.<sup>183</sup>
- Costs for publishing<sup>184</sup> – depends on the media and the size of the publication, and can vary between 20 and 30 BGN.

### **5. Lawyers' Fees**

#### **Availability (or not?) of contingency fees and their conditions**

Bulgarian legal system allows conditional fee arrangements between a lawyer and a client, except for cases involving nonmaterial interest (such as collective action for injunction) – Article 36 (4) of the Bar Act.

However according to the established Bulgarian case-law<sup>185</sup>, conditional fees are not recoverable as they depend on the outcome of the case and, hence, have not been paid up by the end of the trial, e.g. by the end of the final court hearing before the court decision<sup>186</sup>.

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<sup>180</sup> Article 110 of the Obligations and Contracts Act.

<sup>181</sup> Tariff for state fees collected by the courts under the Civil Procedure Code from 2008 [Тарифа за държавните такси, които се събират от съдилищата по Гражданския Процесуален Кодекс (ГПК)] – promulgated in State Gazette 22/28.02.2008, the last amendment promulgated in State Gazette 35/02.05.2017

<sup>182</sup> Ordinance of the Supreme Bar Council No 1 from 2004 on the minimum advocate fees.

<sup>183</sup> Article 7 (2) of Ordinance of the Supreme Bar Council No 1 from 2004 on the minimum advocate fees – promulgated in State Gazette 64/23.07.2004, the last amendment promulgated in State Gazette 84/25.10.2016

<sup>184</sup> Article 382 (2) of CCP.

<sup>185</sup> See Interpretation Ruling № 6 / 06.11.2013 Interpret. Case № 6 / 2012 General Assembly of Civil and Commercial Divisions of the Supreme Court of Cassation

<sup>186</sup> See Article 80 of CCP.

## **6. Funding**

### **a. Availability of funding**

Funding according to Ordinance #RD-16-1117/01.10.2010<sup>187</sup> is applicable also in these actions – Article 6 (1) “c”<sup>188</sup> of the Ordinance.

### **b. Origins of funding (public, private, third party)**

The main source of funding of actions based on Article 189 will be consumers themselves as well as the own resources of consumer protection organisations, acting as their representatives, including state funding.

### **c. Conditions and frequency of resort to third party funding**

No relevant information on third party funding has been found.

### **d. Control of funders (Courts/Legislators/Self-regulation)**

No relevant information on control over third party funding has been found.

### **e. Claimant-Funder relationship**

No relevant information on the relationship between claimants and third party-funders has been found.

## **7. Enforcement of collective actions/settlements**

### **a. Framework for enforcement**

The general provisions of the Code of Civil Procedure (Part V of CCP) are applicable, namely Title 2 “Enforcement of Pecuniary Receivables”.

### **b. Efficient enforcement of compensatory/ injunctive order**

The level of efficiency of compensatory order for damages seems to be the same as of the other orders for payment.

### **c. Cross border enforcement**

Legal Framework is in the Code of Civil Procedure:

- Chapter 57 “Recognition of and Admission to Enforcement of Judgments and Judicial Acts Subject to Operation of Community Law;
- Chapter 58 “Enforcement Pursuant To Regulation (EC) No 1896/2006 of The European Parliament and of The Council creating a European Order for Payment Procedure.

## **8. Number and types of cases brought/pending**

No information about action based on Article 189 of CPA has been found.

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<sup>187</sup> Ordinance #RD-16-1117/01.10.2010 on conditions and rules of providing financial resources to consumers’ organisation by the state

<sup>188</sup> In Bulgarian the letter “b”.

## **9. Impact of the Recommendation/Problems and Critiques**

### **a. Impact of the collective mechanism (or lack of) on behaviour/ policy of stakeholders (direct/ indirect, economic/social impact)**

No impact of this particular redress mechanism has been observed as there do not seem to be any actions brought on Article 189 of CPA.

### **b. Incompatibilities with the Recommendation's principles**

The conclusions are the same as for the other two consumers collective redress mechanisms.

### **c. Problems relating to access of justice/fairness of proceedings including**

#### **Restrictions on access to justice negatively affecting collective redress**

No restriction for redress mechanism under Article 189 of CPA seem to exist.

#### **Time and burden of collective actions on courts and parties compared to non-collective litigation**

The collective redress procedure has specifics which require more time for preparing and managing the case both on the side of the parties involved and the judge hearing the case.

#### **Risks of and examples for abusive litigation**

Such risks exist in Bulgarian practice, however currently only theoretically. No information on abusive litigations has been found.

#### **Effective right to obtain compensation**

Theoretically, there is effective right to obtain compensation. However due to a lack of case law it is difficult to assess its practical importance.

## **III. Information on Collective Redress**

### **1. National Registry**

Such Register does not seem to exist yet.

There is an electronic register of courts acts maintained by the Supreme Judicial Council<sup>189</sup>, however not all collective actions seem to be included in it.

Additionally, the Commission for Consumer Protection is working on its own register of collective actions brought by the Commission.<sup>190</sup>

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<sup>189</sup> Can be found here <http://legalacts.justice.bg/> [last visited on 20.05.2017]

<sup>190</sup> It is still under construction and not functional – <https://www.kzp.bg/registar-kolektivni-iskove> [last visited on 20.05.2017].

## 2. Channels for dissemination of information on collective claims

There are a couple of channels, namely via:

- Announcement on the website of the Commission for Consumer Protection or other organisations for consumer protection;
- Publications in the press or other information in media;
- Announcement at the defendant premises or vehicles.<sup>191</sup>

## IV. Case summaries

<p><b>Case name</b> Toplofikacia-Sofia</p> <p><b>Reference</b> Civil Case № 3912/2008 the Regional Court - Sofia</p> <p><b>Subject area</b> Consumer</p>	<p><b>Keywords</b> Toplofikacia, Unfair practices, Central heating</p> <p><b>Summary of claims</b> The plaintiff is a qualified organisation for protection of consumers' interests (Federation of Consumers in Bulgaria), which brought the following claims:</p> <ul style="list-style-type: none"> <li>o Cessation of unfair practices</li> <li>o Other appropriate measures for termination of infringement (order for the defendant to improve the contents of invoices for consumers, which must be based on the actually delivered heat energy measured by individual appliances)</li> <li>o Damages of collective consumers' interests</li> </ul>
<p><b>Dispute resolution method</b> Group Action</p> <p><b>Court or tribunal</b> Court</p>	<p><b>Findings</b> Based on the conclusion of the technical and accounting expertise, which does not reveal any infringements of the normative methodology for accounting and calculation of the consumed heat energy, the court considers that the central heating company "Toplofikacia-Sofia" and the companies – heat accountants did not commit infringements of this methodology during the period specified by the plaintiff Federation of Consumers in Bulgaria.</p>
<p><b>Cross-border character/ implications, if any</b> N/A</p>	<p><b>Outcomes</b> Settlement: No</p>
<p><b>Opt-in/out</b> Both</p>	<p><b>Costs</b> Loser pays principle applied</p>
<p><b>Type of funding</b> No information on funding available</p>	<p>Remedy: Claim for injunctive relief (Article 186 of CPA) was dismissed; the proceeding for damages on collective interests of consumers (Article 188 of CPA) was terminated by the court.</p>
<p><b>Abusive litigation</b> No</p>	<p>Amount of damages awarded: No damages awarded Distribution of damages: N/A</p>

<sup>191</sup> Decision№ 6951 20.10.2013 Civil Case № 63/2011 City court – Sofia

<p><b>Case name</b> Toplofikacia-Russe</p> <p><b>Reference</b> Civil Case № 412/2015 Court of Appeal - Veliko Tarnovo</p> <p><b>Subject area</b> Consumer</p>	<p><b>Keywords</b> Toplofikacia, Unfair contract terms, Central heating</p> <p><b>Summary of claims</b> The Commission for Consumer Protection requested from the Court:</p> <ul style="list-style-type: none"> <li>○ To declare a term from the standard T&amp;Cs used by the defendant that the consumers' objections to the amount charged do not exempt them from their payment as unfair, thus null and invalid;</li> </ul>
<p><b>Dispute resolution method</b> Group action</p> <p><b>Court or tribunal</b> Court</p>	<ul style="list-style-type: none"> <li>○ To order to the defendant to remove the above unfair term of the content of the standard T&amp;Cs</li> <li>○ To order to the defendant to publish on their own expense the court decision.</li> </ul>
<p><b>Cross-border character/ implications, if any</b> No information available</p>	<p><b>Findings</b> The court sustained all three claims.</p> <p><b>Outcomes</b> Settlement: No Remedy: Injunction:</p>
<p><b>Opt-in/out</b> Both</p>	<ul style="list-style-type: none"> <li>○ Declaring a term as unfair, thus null and invalid</li> </ul>
<p><b>Type of funding</b> State budget (the plaintiff is the Commission for Consumer Protection)</p>	<ul style="list-style-type: none"> <li>○ Removal of the unfair term</li> <li>○ Publishing at defendant's expense the court decision in one national daily newspaper and by a notice on the company's website</li> </ul> <p>Amount of damages awarded: No claim for damages</p>
<p><b>Costs</b> Loser pays principle applied</p>	<p>Distribution of damages: N/A</p>
<p><b>Abusive litigation</b> No</p>	

<p><b>Case name</b> Energo-Pro</p> <p><b>Reference</b> Civil Case № 196/2015 District Court - Varna</p> <p><b>Subject area</b></p>	<p><b>Keywords</b> Electricity, Unfair contract terms</p> <p><b>Summary of claims</b> The Commission for Consumer Protection requested from the Court:</p> <ul style="list-style-type: none"> <li>○ To declare a term from the standard T&amp;Cs allowing the supplier to oblige the consumer to pay</li> </ul>
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Consumer	<p>energy which has not actually been delivered (in cases of an official correction of the readings of the measuring instruments) as unfair, thus null and invalid;</p> <ul style="list-style-type: none"> <li>○ To order to the defendant to publish on their own expense the court decision.</li> </ul> <p><b>Findings</b></p> <p>The court sustained both claims.</p> <p><b>Outcomes</b></p> <p>Settlement: No</p> <p>Remedy: Injunction:</p> <ul style="list-style-type: none"> <li>○ Declaring a term as unfair, thus null and invalid</li> <li>○ Publishing at defendant's expense the court decision in one national daily newspaper and by a notice on the company's website</li> </ul> <p>Amount of damages awarded: No claim for damages</p> <p>Distribution of damages: N/A</p>
<b>Dispute resolution method</b>	
Group action	
<b>Court or tribunal</b>	
Court	
<b>Cross-border character/ implications, if any</b>	
No information available	
<b>Opt-in/out</b>	
Both	
<b>Type of funding</b>	
State budget (the plaintiff is the Commission for Consumer Protection)	
<b>Costs</b>	
Loser pays principle applied	
<b>Abusive litigation</b>	
No	

<b>Case name</b>	<b>Keywords</b>
OK Taxi	Misleading commercial practice, taxi service
<b>Reference</b>	<b>Summary of claims</b>
Civil Case № 63/2011 City Court – Sofia	The Commission for Consumer Protection requested from the Court:
<b>Subject area</b>	<ul style="list-style-type: none"> <li>○ Cessation of unfair (misleading) practice</li> <li>○ Publishing at defendant's expense the court decision in one newspaper, two news portals and announcing in the defendant's vehicles (taxi cars)</li> </ul>
Consumer Competition	
<b>Dispute resolution method</b>	The collective action brought by the Commission for Consumer Protection was preceded by a case and a decision of the Commission for Protection of Competition (the CPC) (Decision # 1089/02.12.2008 case № K3K-539/11.09.2008 of the CPC) against the same company for a violation of the prohibition of imitation of the logo of a competitor – Article 33 (2) of The Protection of Competition Act (published in
Group action	
<b>Court or tribunal</b>	
Court	
<b>Cross-border character/</b>	

<b>implications, if any</b> No information available	State Gazette, 52/1998 and abrogated by the new Protection of Competition Act in 2008).
<b>Opt-in/out</b> Both	<p><b>Findings</b></p> <p>The court found that the defendant while provided taxi transport, was using a distinctive sign ("OK" sign) of the another company provider of the same type of service, but at significantly higher rates. By doing so the defendant affected the decision of the average consumer to use his service and caused consumers damages (i.e. very high rates for services)</p> <p><b>Outcomes</b></p> <p>Settlement: No</p> <p>Remedy: Injunction:</p> <ul style="list-style-type: none"> <li>o Cessation of unfair (misleading) practice</li> <li>o Publishing at defendant's expense the judgment in one newspaper, two news portals and announcing in the defendant's vehicles (taxi cars)</li> </ul> <p>Amount of damages awarded: No claim for damages</p> <p>Distribution of damages: N/A</p>
<b>Type of funding</b> State budget (the plaintiff is the Commission for Consumer Protection)	
<b>Costs</b> Loser pays principle applied	
<b>Abusive litigation</b> No	

<b>Case name</b> Toplofikacia-Sofia	<b>Keywords</b> Unfair practice
<b>Reference</b> Civil Case № 8261/2016 City Court – Sofia	<b>Summary of claims</b> The plaintiff is a qualified organisation for protection of consumers' interests(Consumers Legal Aid Association – Plovdiv), which brought a claims against so called „building installation fee“ (the fee covering the variance between the main appliance measuring the supplied heat energy to the building and individual measurement appliances in each dwelling in the same building)
<b>Subject area</b> Consumer	<p><b>Findings</b></p> <p>The proceeding is pending.</p> <p><b>Outcomes</b></p> <p>Settlement: The proceeding is pending.</p> <p>Remedy: The proceeding is pending.</p> <p>Amount of damages awarded: The proceeding is pending.</p> <p>Distribution of damages: N/A</p>
<b>Dispute resolution method</b> Group action	
<b>Court or tribunal</b> Court	
<b>Cross-border character/ implications, if any</b> No information available	
<b>Opt-in/out</b> No information	



available	
<b>Type of funding</b>	
No information available	
<b>Costs</b>	
Loser pays principle applicable	
<b>Abusive litigation</b>	
No	

<b>Case name</b>	<b>Keywords</b>
Stem Cells Cryobank	Unfair contract terms, Unfair practice, Stem Cells
<b>Reference</b>	<b>Summary of claims</b>
Commercial Case № 1497/2013 City Court – Sofia	The plaintiff is a qualified organisation for protection of consumers' interests(Consumers Legal Aid Association - Plovdiv), which brought the following claims:
<b>Subject area</b>	<ul style="list-style-type: none"> <li>○ Cessation of unfair practice and removal of unfair terms from the standard T&amp;Cs used by defendant</li> <li>○ Publishing at defendant's expense the court decision</li> </ul>
Consumer	<b>Findings</b>
<b>Dispute resolution method</b>	The court found that some of the terms in the standard T&Cs used by the defendant are unfair as well as that certain practices related to obtaining the consent from the defendant's clients were unfair. Cessation of unfair practice and removal of unfair terms from the standard T&Cs used by defendant were partially granted.
Group action	The claim for publishing the court decision was dismissed as during the proceedings the defendant took voluntary actions for removal of some unfair terms i.e. the effect of collective actions for correction of defendant behaviour was achieved.
<b>Court or tribunal</b>	<b>Outcomes</b>
Court	Settlement: No
<b>Cross-border character/ implications, if any</b>	Remedy: Injunction:
No information available	<ul style="list-style-type: none"> <li>○ Cessation of unfair practice and removal of unfair terms from the standard T&amp;Cs used by defendant</li> </ul>
<b>Opt-in/out</b>	Amount of damages awarded: No claim for damages
No information available	Distribution of damages: N/A
<b>Type of funding</b>	
No information available	
<b>Costs</b>	
Loser pays principle applied	
<b>Abusive litigation</b>	
No	

<p><b>Case name</b> Energo-Pro</p> <p><b>Reference</b> Commercial Case № 220/2015 District Court – Varna</p> <p><b>Subject area</b> Consumer</p>	<p><b>Keywords</b> Unfair practice, Electricity</p> <p><b>Summary of claims</b> The plaintiff is a qualified organisation for protection of consumers' interests (Consumers Legal Aid Association - Plovdiv), which brought the following claims:</p> <ul style="list-style-type: none"> <li>○ For the prohibition of unfair commercial practice of the defendant, where the company for the period December 2014 – January 2015 read the electricity used outside the schedule announced in advance</li> <li>○ For the prohibition of unfair the commercial practice, in which the company for the period January 2015 issues to consumers more than one invoice within the same month in violation of the provisions of the standard Terms and Conditions of the company</li> <li>○ Cessation of the above unfair commercial practices.</li> </ul>
<p><b>Dispute resolution method</b> Group action</p> <p><b>Court or tribunal</b> Court</p>	
<p><b>Cross-border character/ implications, if any</b> No information available</p>	<p><b>Findings</b> The court found that these practices are not unfair and dismissed all three claims.</p>
<p><b>Opt-in/out</b> No information available</p>	<p><b>Outcomes</b> Settlement: No Remedy: No, the claims were dismissed. Amount of damages awarded: No claim for damages Distribution of damages: N/A</p>
<p><b>Type of funding</b> No information available</p>	
<p><b>Costs</b> Loser pays principle applied</p>	
<p><b>Abusive litigation</b> No</p>	

<p><b>Case name</b> EVN-Bulgaria Electricity(Plovdiv)</p> <p><b>Reference</b> Commercial Case № 1751/2013 District Court – Plovdiv</p> <p><b>Subject area</b> Consumer</p>	<p><b>Keywords</b> Unfair terms, Electricity</p> <p><b>Summary of claims</b> The plaintiff is a qualified organisation for protection of consumers' interests(Consumers Legal Aid Association - Plovdiv), which brought the following claims:</p> <ul style="list-style-type: none"> <li>○ To order cessation of certain terms from the standard T&amp;Cs used by the defendant as unfair;</li> </ul>
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<p><b>Dispute resolution method</b></p> <p>Group action</p> <p><b>Court or tribunal</b></p> <p>Court</p>	<p>○ To order to the defendant to remove these unfair term of the content of the standard T&amp;Cs.</p> <p><b>Findings</b></p> <p>The court sustained partially the claims (for some of the terms).</p> <p><b>Outcomes</b></p> <p>Settlement: No</p> <p>Remedy: Injunction – some unfair terms were removed from the standard T&amp;Cs used by the defendant.</p> <p>Amount of damages awarded: No claim for damages</p> <p>Distribution of damages: N/A</p>
<p><b>Cross-border character/ implications, if any</b></p> <p>No information available</p>	
<p><b>Opt-in/out</b></p> <p>Opt In</p>	
<p><b>Type of funding</b></p> <p>No information available</p>	
<p><b>Costs</b></p> <p>Loser pays principle applied</p>	
<p><b>Abusive litigation</b></p> <p>No</p>	

<p><b>Case name</b></p> <p>EVN-Bulgaria Heating (Plovdiv)</p> <p><b>Reference</b></p> <p>Civil Case № 1557/2015 District Court – Plovdiv</p> <p><b>Subject area</b></p> <p>Consumer</p>	<p><b>Keywords</b></p> <p>Unfair practice, Central Heating</p> <p><b>Summary of claims</b></p> <p>The plaintiff is a qualified organisation for protection of consumers' interests(Consumers Legal Aid Association - Plovdiv), which brought the following claims:</p> <p>○ Prohibition of unfair commercial practice of the defendant, which, in infringement of the collective interests of consumers, consists in the requirement for payment of goods (heat given to the building installation) by consumers, who do not use heating services and do not want to be supplied with such heat energy in their dwellings.</p> <p><b>Findings</b></p> <p>The proceeding is still pending.</p> <p><b>Outcomes</b></p> <p>Settlement: The proceeding is still pending.</p> <p>Remedy: The proceeding is still pending.</p> <p>Amount of damages awarded: No claim for damages</p>
<p><b>Dispute resolution method</b></p> <p>Group action</p> <p><b>Court or tribunal</b></p> <p>Court</p>	
<p><b>Cross-border character/ implications, if any</b></p> <p>No information available</p>	

<b>Opt-in/out</b> No information available	Distribution of damages: N/A
<b>Type of funding</b> No information available	
<b>Costs</b> Loser pays principle applicable	
<b>Abusive litigation</b> No	

<b>Case name</b> Orlandonet Ltd	<b>Keywords</b> Unfair contract terms, Services for Internet access and interactive digital TV  <b>Summary of claims</b> The plaintiff is a qualified organisation for protection of consumers' interests( Bulgarian National Association Active Consumers), which brought the following claims: <ul style="list-style-type: none"> <li>○ For declaration of nullity of an unfair clause (Art. 31 sentence. 2 of the General Conditions for the provision of services for Internet access and interactive digital TV "Orlandonet" Ltd.) and</li> <li>○ For suspension and prohibition of applying the clause that appears in breach of the collective interests of consumers and contrary to the Chapter Six "Unfair terms in Consumer Contracts" (Article 186, para. 2, item 1 CPA)</li> <li>○ Claim for damages with an amount of 5000 BGN caused to the collective interests of consumers by application of art. 31, sentence 2 of the General Conditions for the provision of services for Internet access and interactive digital TV "Orlandonet" LTD.</li> </ul>
<b>Reference</b> Commercial Case № 8441/2013 City Court – Sofia	
<b>Subject area</b> Consumer	
<b>Dispute resolution method</b> Group action	
<b>Court or tribunal</b> Court	
<b>Cross-border character/ implications, if any</b> No information available	
<b>Opt-in/out</b> No information available	
<b>Type of funding</b> No information available	
<b>Costs</b> Loser pays principle applicable	
<b>Abusive litigation</b>	

No	
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<p><b>Case name</b> CREDIT INS Ltd</p> <p><b>Reference</b> Commercial Case № 8335/2014 City Court – Sofia</p> <p><b>Subject area</b> Consumer</p>	<p><b>Keywords</b> Unfair contract terms, Consumer credit</p> <p><b>Summary of claims</b> The plaintiff is a qualified organisation for protection of consumers' interests (Bulgarian National Association Active Consumers), which brought the following claims:</p> <ul style="list-style-type: none"> <li>○ For declaration of nullity of an unfair clause (T.4.41, T.12.4., T.12.5., T.12.6., On the Terms and Conditions applicable to contracts for the provision of consumer credit "Credit INS" Ltd.)</li> <li>○ For suspension and ban the application of the above term, which is an act in infringement of the collective interests of consumers being contrary to Chapter Six "Unfair terms in consumer contracts" (art. 186, para. 2, item 1 LCP)</li> <li>○ Claim for damages with an amount of 10,000 BGN caused to the collective interests of consumers by implementing T.4.41, T.12.4., T.12.5., T.12.6., from the Terms and Conditions applicable to contracts for the provision of consumer credit "Credit INS" Ltd.</li> </ul>
<p><b>Dispute resolution method</b> Group action</p> <p><b>Court or tribunal</b> Court</p>	
<p><b>Cross-border character/ implications, if any</b> No information available</p>	
<p><b>Opt-in/out</b> No information available</p>	<p><b>Findings</b> The proceeding was terminated by ruling #2840 / 13.10.2015 as the affected collective interest was not specified. Currently pending at the Court of Appeal – Sofia</p>
<p><b>Type of funding</b> No information available</p>	
<p><b>Costs</b> Loser pays principle applicable</p>	<p><b>Outcomes</b> Settlement: The proceeding is pending at the Court of Appeal - Sofia. Remedy: The proceeding is pending at the Court of Appeal - Sofia.</p>
<p><b>Abusive litigation</b> No</p>	<p>Amount of damages awarded: The proceeding is pending at the Court of Appeal - Sofia. Distribution of damages: N/A</p>

<p><b>Case name</b> BTUR Ltd</p> <p><b>Reference</b> Civil Case № 16588/2015 City Court – Sofia</p>	<p><b>Keywords</b> Unfair contract terms, Package travel</p> <p><b>Summary of claims</b> The plaintiff is a qualified organisation for protection of consumers' interests (Bulgarian National Association Active Consumers), which brought the</p>
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<b>Subject area</b> Consumer	claim for damages with an amount of 2.500 BGN caused to the collective interests of consumers by unfair terms from the standard T&Cs of the defendant applied to consumer contracts for package travels. These contract terms were proclaimed as unfair in the procedure under Article 186 of CPA initiated by the Commission for Consumer Protection (civil case 4247/2014 of City Court – Sofia).
<b>Dispute resolution method</b> Group action <b>Court or tribunal</b> Court	
<b>Cross-border character/ implications, if any</b> No information available	<b>Findings</b> The claim was dismissed (on 25.04.2017) because the plaintiff didn't succeed in proving the amount of damages. <b>Outcomes</b> Settlement: No.
<b>Opt-in/out</b> No information available	Remedy: The claim was dismissed Amount of damages awarded: The claim was dismissed
<b>Type of funding</b> No information available	Distribution of damages: N/A
<b>Costs</b> Loser pays principle applied	
<b>Abusive litigation</b> No	

# CROATIA – FACTSHEET

## Scope

Horizontal mechanism which allows **injunctive** relief only.

Provisions on a general mechanism are applicable only when there is a sectoral mechanism but a certain aspect of proceedings initiated by the sectoral mechanism (under provisions of a *lex specialis*) are not regulated (currently only consumer and discrimination sectors).

Joinder of parties and Consolidation of ind. proceedings available.

Sectoral mechanism which provides **injunctive** relief only. Two types of sectoral collective redress mechanisms:

**(a) Consumer law** (Consumer Protection Act (ZZP)) and

**(b) Anti-discrimination Act** (ZSD) in 2008.

There is no out-of-court collective redress mechanism.

## **Problems/Incompatibilities with Recommendation principles**

Limited development of sectoral mechanisms reduce scope of application of mechanisms.

No compensatory collective redress.

Joinder mechanisms not appropriate as they are aimed at expedient and efficient conduct of proceedings.

## **Standing** (Para. 4-7)

Consumer: brought by consumer organisations and national authorities (defined list of 4 State Ministries and 2 org.)

Discrimination: brought by associations, institutions and/or organisations

General: standing determined by legislation or through organisations' prescribed activities.

## **Problems/Incompatibilities with Recommendation principles**

Conflicts of interest occur with government ministry involvement.

Limited entities authorised mean that some authorised organisations bring claims on behalf of other non-authorised entities based on a fictitious relationship. See Franak case.

Different rules apply also as to the content of the judgment, the effect of a final and binding judgment on the members of the group and enforcement of a judgment.

## **Admissibility** (Para. 8-9)

Early determination of admissibility questions

## **Information on Collective Redress** (Para. 10-12, 35-37)

Specific channels for information on collective redress actions not available.

## **Problems/Incompatibilities with Recommendation principles**

No information or national registry

## **Funding** (Para. 14-16)

Sources of funding include associations-members' fees and/or public funds (consumer assoc.).

Third Party funding not allowed

### **Problems/Incompatibilities with Recommendation principles**

No control of Funders

No special provisions requiring a claimant party to declare the origin of any funding (e.g. membership fees etc) at the outset of proceedings

### **Cross Border Cases (Para. 17-18)**

National rules on admissibility or standing facilitate foreign claimant or foreign representative entity involvement

### **Problems/Incompatibilities with Recommendation principles**

Very narrow scope of foreign party involvement. Cross border claims in anti-discrimination not allowed.

### **Expedient procedures for injunctive orders (Para. 19)**

No national legislation requiring courts to treat claims for injunctive orders with all due expediency in consumer and general mechanism.

No special case management expedient procedures for injunctive relief in consumer and general mechanism.

Expedient injunctive procedure for anti-discrimination claims. Court and/or other entitled bodies mandated to act expediently when conducting proceedings (Art. 63/3 ZSD)

### **Problems/Incompatibilities with Recommendation principles**

Current rules create a restriction on access to justice in injunctive claims.

Application of ordinary procedural rules to collective claims create delay and unfairness

Practice of decisions being appealed as norm obstructs finality and enforcement

### **Efficient enforcement of injunctive orders (Para. 20)**

Sanctions available for non-compliance with the injunctive order across all areas (Article 116/2 ZPP). Sanctions may take the form of a fixed amount or daily rate: Up to 10 000,00-30 000,00 HRK (approx. 1 500-4 000 EUR) for natural persons and 10 000,00-100.000,00 HRK (1500-15 000 EUR) for legal persons.

Sanctions to be outlined as part of the original injunctive order given pursuant to the collective redress proceedings. Applicable to consumer, anti-discrimination and general mechanisms.

### **Opt In/Opt Out (Para. 21-24)**

Neither Opt-out nor Opt-In. Representative entity brings claim in own right.

### **Collective ADR and Settlements (Para. 25-28)**

Parties encouraged to settle disputes consensually or out of court. During the proceedings the court informs the parties on the possibility of reaching a settlement and assists them to reach it (Article 321 para 3 ZPP).

Courts are not entitled to verify the content of a settlement reached by the parties.

Conciliation procedure possible prior to commencement of consumer collective claim. Limitation period suspended if parties choose to proceed with conciliation

### **Costs (Para. 13)**

The Loser Pays Principle applies. Court Costs are recoverable



**Lawyers' Fees** (Para. 29-30)

Contingency fees not allowed. Lawyers' fees do not incentivise unnecessary litigation

**Prohibition of punitive damages** (Para. 31)

Punitive damages not available.

Skimming off/restitution of profits not available.

**Collective Follow- on actions** (Para 33-34)

No possibility of compensatory collective redress. Limitation or prescription periods for individual follow-on damages actions are suspended during injunction/declaratory procedure in consumer law.

**Interplay between injunctions and compensation across all sectors**

Not possible to seek injunction and compensation in single action.

Individual damages follow-on actions may rely on injunctive orders gained via general and sectoral mechanisms.

Under general mechanism, plaintiff can also bring a restitutorial claim alongside collective injunctive action

# CROATIA - REPORT

## I. General Collective Redress Mechanism

### 1. Scope/ Type

#### a. General representative action

The available Croatian general collective redress mechanism is a representative action under ZPP (a claim for protection of collective interests and rights). It provides associations, entities and organizations with a possibility to claim cessation of illegal behaviour. The general mechanism cannot be applied directly, but only if a special Act regulating a sectoral mechanism (*lex specialis*) does not regulate a certain aspect which is regulated under the provisions on a general mechanism. Therefore, under the provisions which prescribe the general mechanism, there are no restrictions/stipulations as to the illegal behaviour in which claims can be brought which could be applied in the proceedings.

The representative entity can bring a declaratory claim and seek determination that the defendant's illegal behaviour has harmed or exposed members of a specific group to the risk of a harm, a restitutorial claim seeking activities to be undertaken which will eliminate the consequences of the illegal behaviour of the defendant as well as a publicational claim seeking publication of the ruling in which the court has accepted claims brought by the plaintiff (Article 502b ZPP). Representative action under ZPP has a horizontal effect insofar as the possible scope of its subsidiary application is without restrictions to a special area stipulated in proceedings for protection of environmental, moral, ethnic, consumer, anti-discrimination and any other interests. However, this 'horizontal' framework for collective redress proceedings under ZPP consists of only a general definition and a few general provisions on a representative action under ZPP.<sup>192</sup>

The relevant provisions of ZPP on the general collective redress mechanism provide no definition or explanation of the moral and ethnic interests. However, the list containing moral and ethnic interests is an open list so other similar interests could also be protected under collective redress mechanisms. But, in order for these interests to be protected under collective redress mechanisms, there should be a special Act (*lex specialis*) which would provide for a possibility to claim cessation of illegal behaviour which infringes moral or ethnic interests. At the moment, there is no such sectoral mechanism.

#### b. Joinder of parties

Alongside judicial collective redress there is a possibility to collectively initiate individual civil proceedings in a form of a joinder of parties (*suparničarstvo*; *litis consortium*). Joinder of parties is equally possible for plaintiffs (*aktivno suparničarstvo*) as well as defendants (*pasivno suparničarstvo*). In order for the court to allow joinder of parties, the parties have to prove that a) they jointly own claims or their rights originate from the same factual and legal basis, b) the subject matter is based on the same or similar issues of law and fact and the same court has jurisdiction over every individual claim and each

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<sup>192</sup>Uzelac A. (2014), p. 56.

defendant, c) in the case at hand, joinder of parties is prescribed by provisions of a separate act. Joinder mechanisms exist in ordinary and necessary form.

### **c. Ordinary joinder of parties**

In cases of ordinary joinder of parties as plaintiffs (obično aktivno suparničarstvo) each of the plaintiffs remains a separate party and there is no uniform treatment of plaintiffs and their claims. The ruling of the court may even be different for each one of them, so every plaintiff can potentially win or lose their individual action regardless of the success of other plaintiffs. The actions taken by each plaintiff is without influence to the procedural position of other plaintiffs and it cannot benefit or place other plaintiffs in a disadvantaged position. If the court finds that there are reasons to stay proceedings for one of the plaintiffs, the court proceeds with the hearing for other plaintiffs. The judgment of the court has separate *res judicata* effect toward each of the plaintiffs.<sup>193</sup>

### **d. Necessary joinder of parties**

A somewhat different possibility is provided under necessary joinder of parties (nužno suparničarstvo) which derives from provisions on necessary parties (Article 354 para 2 p 6 ZPP). Namely, in order for the court to allow the proceedings to be initiated, all parties participating in the legal relationship which is at the centre of the dispute need to join the proceedings. Given the strong relationship between the joined parties, the judgment must resolve a dispute in the same manner (uniformly) towards all joined parties.

### **e. Consolidation of proceedings**

If there are several claims pending at the same court, brought in disputes between the same parties, or in disputes in which the same person is counter-party against different plaintiffs or defendants, all of the claims can be joined at the initiative of the court (Article 313/1 ZPP). The judge who has initiated the consolidation will take further proceedings. Typically, the court delivers the same (uniform) ruling on all of the claims (Article 313/1 ZPP).

## **2. Procedural Framework**

### **a. Competent Court**

In Croatia municipal courts (općinski sudovi) and commercial courts (trgovački sudovi) have jurisdiction in civil cases. Municipal courts are ordinary courts which adjudicate in the first instance in disputes over the basic rights and obligations of man and citizen, over personal and family relations, in commercial property and other civil law disputes which are not in the first instance jurisdiction of commercial court (Article 34/2 ZPP).

In proceedings initiated by a representative action under ZPP, judicial power is vested in the court of the defendant's domicile (prebivalište) as a court of general territorial jurisdiction (*forum generale*) or the court of the place where the action was undertaken, which has harmed collective interests or rights for whose protection the claim has been brought, if not otherwise prescribed by provisions of a separate act (Article 502e ZPP). As a rule, subject-matter jurisdiction (*ratione materiae*) in proceedings initiated by a

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<sup>193</sup>Dika M. (2008), p. 160. Poretti P. (2014), p. 34.

representative action under ZPP will be vested in the courts under the ordinary rules on subject-matter jurisdiction (Article 34-34b ZPP). According to these rules, in disputes between natural persons and legal entities or crafts persons or sole traders municipal courts have first instance jurisdiction. Commercial courts adjudicate in first instance in disputes between legal entities, legal entities and crafts persons, legal entities and sole traders, disputes between craftsmen and disputes between sole traders.

The rule on territorial jurisdiction in collective redress proceedings under Article 502e ZPP could also be applied for determining general jurisdiction of Croatian courts in cross-border collective redress proceedings.<sup>194</sup>

In proceedings initiated according to Art. 502a, para. 1 ZPP, there are no special procedural provisions which apply to the general collective redress mechanism, rather traditional procedural rules prescribed in the ZPP apply.

## **b. Standing**

Standing to bring a representative action under Article 502a/1 ZPP is afforded to associations, entities, institutions and other organisations established according to ordinary statutory conditions and defined conditions of eligibility for bringing representative actions under ZPP against a natural or legal person who within his/her trade or professional activity harms or exposes to the risk of harm collective interests and rights.

Conditions of eligibility for bringing representative actions under ZPP include requirements that:

- legal persons and entities should in the scope of their registered or statutory prescribed activities protect collective rights and interests of the group in question
- legal persons and entities should be afforded standing to bring representative action by law
- legal protection of collective interests and rights should be acquired in the course of proceedings initiated by a representative action
- a representative action is brought against natural and legal persons who within his/her trade or professional activity harms or exposes to the risk of harm collective interests and rights (Article 502a/1 ZPP).

Alongside associations and institutions, other organisations established according to statutory conditions such as foundations, trade associations, chambers etc., public entities and regional and local self-governmental entities could also be afforded standing under Article 502a/1 ZPP. Natural persons are not entitled to initiate collective redress proceedings under ZPP because the Croatian legal system does not provide a *class action* mechanism.<sup>195</sup>

Under Article 502a ZPP, persons and entities should be able to prove that they are founded in accordance with the law and that within their registered activity, they protect collective interest of a certain kind. However, this provision applies subsidiary, meaning that it can be applied only to standing of certain entities and persons whose entitlement to initiate collective redress proceedings is regulated under special act (*lex specialis*).

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<sup>194</sup> Dika M. (2011), p. 143.

<sup>195</sup> Dika M. (2011), p. 153.

Although requirements for representative entities to have a non-profit making criteria, to have a direct relationship between the main objectives of the entity and the rights claimed to have been violated and to demonstrate sufficient financial resources, human resources and legal expertise are not explicitly provided in legislation, associations as representative entities under the relevant legislation (usually) satisfy all of these requirements. Also, although there is no formal obligation for a court to examine whether all of these requirements are met, the court would probably check if the association within its registered activity, protects collective interest of a certain kind and whether it has at least sufficient financial resources (in order to be able to pay for the costs in case the association should lose the proceedings).

Since formal requirements are not prescribed in the legislation, there is no possibility for the representative entity to lose their status if one or more of the conditions are no longer met (except for the requirement of financial resources which is also a requirement under general provisions of procedural law).

**c. Availability of Cross Border collective redress**

There are no provisions in the ZPP on cross-border collective redress. Nevertheless, cross-border collective redress is available in Croatian legal system. Namely, provisions on cross-border consumer collective redress are prescribed in Article 107/2-7 ZPP (see under III. Sectoral Collective Redress Mechanism(s)/Consumer law). Thereby, provisions on collective redress proceedings under ZPP can be applied subsidiary in cross-border collective redress proceedings.

**d. Opt In/ Opt Out**

When collective redress proceedings is initiated, members of the group do not assign their claims to associations or other institutions. The representative action affords only abstract legal protection. Hence, with no possibility for the natural person to initiate collective redress proceedings as plaintiff, or assign his/her claim to the entitled associations, institutions or organisations, there is no need for application of either *opt-in* or *opt-out* principle for constitution of the claimant party.

**e. Main procedural rules**

There is no certification process before initiating collective redress proceedings under ZPP. The ordinary procedural rule under Article 282 ZPP enables the court at the earliest possible stage (at the stage of preliminary examination of the claim) to conduct *ex officio* verification if ordinary conditions for conducting proceedings are met. The preliminary examination enables the court to issue a ruling dismissing the claim if it establishes that it is not within the judicial power or it was submitted untimely or that there was no conciliation before filing claim, although the law orders such conciliation.

In this sense, current mechanisms only provide for verification if the claim is founded or manifestly unfounded under general provisions of the procedural law (Article 282 ZPP). No other verification of a claim (especially not in terms of specific criteria relevant for collective redress mechanisms, such as verification of certification criteria – e.g. existence of a large number of claimants-group) is possible. Since only a representative action aiming at injunctive relief is available under the ZPP, the lack of specific provisions on

verification of conditions for collective redress should not undermine the efficiency of the available general collective redress mechanism.

### **Single or Multi-stage process**

First instance civil proceedings in Croatia consist of two parts, a preparation of the main hearing and the main hearing (*glavna rasprava*). During preparation of the main hearing the court examines the claim, serves the claim to the defendant-on the defendant to answer, holds the preparatory hearing, closes the preliminary proceedings and schedules the main hearing. After the preliminary proceedings are concluded, the general provision does not allow submitting new facts and evidence at the main hearing.

The proceedings initiated by a representative action under ZPP could be considered a single-staged process which consists of the preparation of the main hearing and the main hearing. The court renders a judgment on the claim brought by an association, institutions or an organisation as a plaintiff seeking cessation of illegal behaviour and/or determination that the defendant's illegal behaviour has harmed or exposed members of a specific group to the risk of a harm, seeking activities to be undertaken which will eliminate the consequences of the illegal behaviour of the defendant as well as seeking publication of the ruling in which the court has accepted claims brought by the plaintiff.

The additional individual proceedings seeking compensation which may follow collective redress proceedings should be considered a separate litigation, not a second stage of the process.

### **Case-management and deadlines**

Due to the placement of provisions on general collective redress mechanism in the section 3 of the Croatian Procedural Act (ZPP) under which special procedures are regulated, there should be special provisions on deadlines and case-management in collective redress proceedings. In collective redress proceedings under ZPP, ordinary procedural rules apply, so there are no special requirements on deadlines or case-management. In particular, there are no provisions on expediency of collective redress proceedings under ZPP which are aimed at injunctive relief. Under ordinary procedural rules a judge controls the proceedings, takes testimonies of the parties, sets deadlines and decides on procedural motions and requests of the parties. As it concerns evidence and discovery, the ordinary procedural rule, under which each party is obliged to state the facts and propose the evidence upon which his/her claim is based, and by means of which he/she contests the facts stated and evidence proposed by the opposing party, applies (Article 219/1 ZPP).

### **Interim measures**

Before or during proceedings initiated by a representative action under ZPP, at a request of the plaintiff, the court may order interim measures prescribed under Croatian Enforcement Act (hereinafter: OZ) (Official Gazette 112/12, 25/13, 93/14, 55/16) if the following requirements are met:

- a) Defendant's actions have harmed or exposed to harm collective interest and rights
- b) An interim measure is necessary for removing danger of irreparable danger or stopping violence.

The request for issuing an interim measures may include a petition for the court to temporarily define rules under which the defendant will conduct their professional activities (regulatory interim measure).<sup>196</sup>

### **Court directed settlement option during procedure**

There are no special provisions on reaching a settlement. However, parties to the collective redress proceedings under ZPP are free to reach a court settlement (sudska nagodba) of a matter of controversy under ordinary rules of civil procedure (Article 321 ZPP). The parties may reach a settlement in regard to the whole claim or part thereof. During the proceedings the court shall inform the parties on the possibility of reaching a settlement and shall assist them to reach it (Article 321 para 3 ZPP). The agreement reached by the parties is recorded in the minutes (zapisnik) and it is considered reached after the minutes have been signed by the parties (Article 322 ZPP).

Before initiating the proceedings, the person who intends to bring a claim may through a lower court of first instance in the territory in which the opposing party has permanent residence try to reach a settlement. The seized court shall summon the opposing party and inform him/her about the motion for settlement (Article 324 ZPP). The current legal framework provides no specific rules on judicial control of out court settlements reached in collective redress proceedings under ZPP either. Therefore, Croatian courts are not entitled to verify the content of a settlement reached by the parties before court (except in family matters). So, there is no possibility for the courts to verify whether the rights and interests of all parties are protected where a settlement has been reached in collective redress proceedings.

## **3. Available Remedies**

Representative action under ZPP is not aimed at compensation of damages. Punitive damages are not available under Croatian procedural law. The court cannot order skimming off profits, that the defendant has made through illegal practice or behaviour in a judgment rendered in collective redress proceedings under ZPP. There is no possibility to seek an injunction and compensation within one single action brought by a plaintiff in order to initiate collective redress proceedings under ZPP. However, it is possible to rely on an injunction in a separate follow on action. In addition to a subsequent (follow-on individual) proceedings for compensation of damages, a claimant will also be able to rely on a ruling on a prohibitional claim ordering the defendant cessation of illegal behaviour and a ruling on a restitutorial claim ordering the defendant taking of actions which will eliminate the consequence of his illegal behaviour.<sup>197</sup> There are no diverging provisions on court proceedings, since general provisions on civil procedure contained in ZPP apply. There can only be diverging provisions on substantial law depending of area of law.

A sanction against the losing defendant in a form of a fixed amount which the court orders the defendant to pay at the request of the plaintiff, if he fails to comply with the injunctive order or for each day's delay is only prescribed under Article 116/2 ZPP. At the moment, there are no other sanctions in cases of injunctive relief apart from the sanction regulated under Article 116/2 ZPP provided under the relevant legislation.

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<sup>196</sup>Dika M. (2011), p. 144.

<sup>197</sup>Dika M. (2011), p. 141-142.

In accordance with Article 116/1 ZPP the court orders the deadline (time limit) for the defendant to comply with the injunction order. Also, at the request of a person or a body entitled to initiate consumer collective proceedings the court may order a sanction in case the defendant does not comply with the injunction order or fails to comply with it on time (116/2 ZPP). But, with no formal mechanisms established for monitoring compliance with injunction orders, it is not certain how the monitoring of the compliance will take place.

The sanction in Article 116/2 ZPP is a monetary fine (penalty) ordered by court in accordance with Article 16/1 OZ, up to 10 000,00-30 000,00 HRK (approx. 1 500-4 000 EUR) for natural persons and 10 000,00-100.000,00 HRK (1500-15 000 EUR) for legal persons.

### **Limitation periods**

In Croatian legal system limitation periods are prescribed by substantive law. The general rule under Croatian Obligations Act (hereinafter: ZOO) (Official Gazette 35/05, 41/08, 125/11, 78/15) determines the limitation period of 5 years (unless otherwise provided by law for specific claims). Some of these limitation periods are a period of 1 year (telephone services) and 3 years (claims arising out of commercial agreements). In general, limitation periods begin 1 day after the date the creditor had a right to demand fulfilment of the obligation. In accordance with the general legal regulation on limitation periods in Croatian law, there are no provisions on limitation periods for collective redress proceedings under ZPP. The court interpreted these provisions on limitation period in a recent judgment (County court in Osijek, Gž-820/2017-3) stating that by initiating collective redress proceedings before Commercial court in Zagreb (*Franak* case) limitation period in the dispute was suspended, and after the High Commercial court delivered its judgment (*res iudicata*) (Pž-7129/13) on May, 13th 2014 the limitation period started from the beginning. The time which elapsed before the limitation period was suspended will not be added to the time elapsed after the limitation period started again.

Limitation periods may be provided under provisions on collective redress mechanisms under separate substantive acts in the field of environmental, consumer or anti-discrimination protection etc., for which the provisions on collective redress proceedings under ZPP constitute a subsidiary legal basis. For now, such provisions are not provided.

There are no special limitation rules in follow-on cases under the relevant regulation on collective redress, so general rules on suspension of limitation periods apply also to these proceedings (since they are considered as regular individual (private) civil proceedings)..

## **4. Costs**

### **a. Basic rules governing costs and scope of the rules**

Under the basic rules governing litigation costs (*parnični troškovi*), costs include expenses incurred in the course of or due to the proceedings (Article 151/1 ZPP). They also include remuneration for the work of attorney-at-law and other persons to whom the law recognizes the right to remuneration (Article 151/2 ZPP). Each party shall cover, in advance, the costs he/she incurred as a result of his/her action (Article 152 ZPP). If a party is partially



successful in his/her litigation, the court may order with respect to the success achieved that each party bear their own costs or the court may order for one party to pay the other and his/her intervener a proportional share of the costs (Article 154/2 ZPP). It is safe to say that the costs system will not lead to increase in unnecessary litigation in the future. Plaintiffs are aware that in case they lost, they would bear the costs of proceedings, so they are not prone to bringing meritorious claims, let alone initiating unnecessary litigation, due to the limited availability of funding.

#### **b. Loser Pays Principle (and exceptions from it)**

In proceedings initiated by a representative action under ZPP the court follows the basic 'loser pays principle'. The judgment of the Croatian Supreme Court (Vrhovni sud Republike Hrvatske) VsH Rev-129/09 from March 23, 2010 could provide a significant basis for the court to facilitate entitled persons, especially associations in conducting collective redress proceedings without the fear of bearing the costs of the litigation, in case they lost.

Also, if collective redress proceedings are concluded with a settlement, under the basic procedural rule, if not otherwise agreed in the settlement, each party shall bear his/her own costs (Article 159/1 ZPP). Although there are no explicit provisions on the availability of the free legal aid system in collective redress proceedings under the Free Legal Aid Act (hereinafter: ZBPP) (Official Gazette 62/08, 44/11, 81/11), Croatian legal theory welcomed interpretation of the rules of the ZBPP in such a way to facilitate access to court to persons entitled to initiate collective redress proceedings.<sup>198</sup>

### **5. Lawyers' Fees**

The costs of representation of a lawyer (lawyer's fees) are regulated by the Law on the Legal Profession ('Attorney's Act') (hereinafter: ZO) (Official Gazette 09/94, 117/08, 50/09, 75/09, 18/11) and the Tariff for Lawyers' fees and Cost Compensation (Official Gazette 142/12, 103/14, 118/14, 107/15). The court determines and recognizes the costs at a request of the parties in accordance with the provisions of the Tariff for Lawyers' fees and Cost Compensation. Contingency fee agreements between the party and his/her lawyer are only permitted in property matters up to a max 30 % of the awarded amount. There are no special provisions on contingency fees in legislation, apart from the exemption concerning contingency fee agreements in property matters. These general principles on lawyer's fees apply also to collective redress proceedings under ZPP, since there are no special provisions which provide otherwise. However, relevant provisions on collective redress do not provide for a possibility to initiate proceedings in property matters at the moment. Furthermore, the Attorney's Act and the litigation costs system in Croatia do not create any special incentive to litigate. Namely, general provisions of the Attorney's Act apply also to collective redress proceedings, so there are no special provisions which would encourage plaintiffs to initiate proceedings.

### **6. Funding**

There is no litigation funding system available under Croatian law and third party funding is not permitted. There is only a limited availability of legal

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<sup>198</sup> Johnsen J.T., Stawa G., Uzelac A. (2010), p. 35.

expense insurance under Croatian insurance law, which is not applied often, since the insurance companies in Croatia do not tend to cover litigation costs. However, Croatian procedural law provides a possibility of 'cautio judicatum solvi'. Associations are funded from membership fees, voluntary contributions, donations and gifts, commercial activities and asset-generated income. Also, programs and projects in the public interest in Croatia which are implemented by associations are funded from the state budget, budget of local and regional self-government units, EU funds and other public source.<sup>199</sup> Funding from public sources is available to those associations which provide services which the state or local community have not developed, mostly at lower costs for the same quality and which include volunteers and/or employ experts, as well as contribute to the development of social capital.

There are no special provisions which would require a claimant party to declare the origin of any funding (e.g. membership fees etc) at the outset of proceedings. The court is aware of sources of funding, (e.g. state funding, membership fees etc) which are available to the claimant party (associations), so there is no need for special declaration of the funds received.

## **7. Enforcement of collective actions/settlements**

Under Croatian OZ municipal courts have subject-matter jurisdiction to order enforcement, unless adjudication in such matters is entrusted to other court, body or a person (Article 37/1 OZ). A final and enforceable judgment is enforced by a court (real estate, movable property) or the Croatian Financial Agency/FINA (financial assets in bank accounts).

Apart from the exception discussed below in consumer claims, there are no differences among provisions on enforcement of injunctive orders delivered in collective redress proceedings in Croatian law, particularly, under the ZPP. All provisions for enforcement relate exclusively to court proceedings, not to administrative proceedings. The person/body asks for sanctions to be outlined as part of the original injunctive order given pursuant to the collective redress proceedings. When delivering the injunctive order, the court also outlines the sanction. In this way, in the later scenario of non-compliance of the defendant with the order, the person/body can request enforcement of judgment in which the sanction is outlined.

There is only a provision according to which upon rendering of a judgment a court may decide that an appeal does not suspend enforcement of a judgment or that shorter deadlines for the fulfilment of actions ordered to the defendant apply (Article 502 f ZPP).

## **8. Impact of the Recommendation/Problems and Critiques**

One of the most criticized aspects of Croatian collective redress mechanisms is a lack of a compensatory collective redress mechanism. It seems that the legislator perceives the existing solution under which each person whose rights have been violated needs to claim damages in separate individual proceedings following collective redress proceedings as satisfactory. Namely,

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<sup>199</sup>The standards for funding have been determined by the Regulation on the criteria, standards and procedures of financing and contracting programs and projects of interest to the public good implemented by associations (Official Gazette 26/15).

due to the prejudicial effect of the ruling delivered in collective redress proceedings, the court would be bound in the individually initiated disputes over damages, if it determines that the plaintiff is a member of a group in question, by the determination of the illegal action of the defendant and would not need to deliberate the defendant's liability, but only the existence and amount of damages paid to the plaintiff. At the same time, the analysis of the court practice shows that there is inconsistency between the judgments of municipal courts in the disputes over damages which contributes to legal uncertainty and does not render an equal opportunity to all individual plaintiffs whose rights have been violated to receive compensation.

**a. Consequences where no collective redress mechanism is available**

Limitation of availability of collective redress mechanisms to the field of consumer protection and anti-discrimination has significantly reduced the potential for its development and application in Croatian legal system. Due to the subsidiary application of the general collective mechanism, the existing provisions on a representative action under ZPP cannot be applied every time a situation is detected, in which collective redress would ensure access to justice, for example in cases of environmental pollution, or harm caused by illegal behaviour in the field of competition, protection of personal data, financial services and investor protection (which are indicated in the Recommendation, as field in which application of collective redress would be appropriate).

The other important feature leading to the limitation of availability of collective redress mechanism is the lack of compensatory relief. Namely, individual actions which need to be brought by members of the group in order to seek compensation of damages cause additional costs for the members of the group. Also, there is great inconsistency among judgments rendered in individual proceedings for compensation of damages which adds to the fear of losing the proceedings. Hence, many members of the group decided against initiating individual proceedings for compensation of damages despite the favourable judgment of the court in Franak case.

**b. Incompatibilities with the Recommendation's principles**

Collective redress was introduced in Croatian legal system as part of the obligation on alignment of the Croatian existing legislation with the *acquis communautaire*. However, apart from initial interventions in the ZZP and ZSD in order to transpose the relevant directives and to introduce provisions on sectoral collective redress mechanisms, Croatian legislator has not done much. In spite of the provisions of the Recommendations (Recital 24-25), no efforts have been made in order to implement the principles set out in the Recommendation. At the moment, features of the existing mechanisms differ significantly from the features of the collective redress mechanisms envisaged by the Recommendation.

The principles applied in proceedings initiated under existing legal framework for collective redress are not created for the specific purpose of being followed in collective redress proceedings aimed at facilitating access to justice in relation to violations of rights guaranteed under EU and national law. Instead, sometimes application of these principles can have a negative effect, undermining the effectiveness of the collective redress mechanism. These are:

- There are different criteria as to persons and entities entitled to initiate proceedings. In comparison, while the ZPP and ZSD contain an open formula ('any person or an entity'), ZPP provides for a list of persons and entities qualified under the Decision (of the Government). Different rules apply also as to the content of the judgment, the effect of a final and binding judgment on the members of the group and enforcement of a judgment.
- No compensatory relief is available in collective redress proceedings
- Joinder of parties and consolidation of proceedings are traditional forms of multi-party litigation conducted as individual civil procedure, in which ordinary procedural rules apply. They are aimed at expedient and efficient conduct of proceedings. In comparison, the aim of collective redress proceedings is facilitating access to justice in situations in which members of the group affected by illegal behaviour of the defendant would not be interested in initiating individual proceedings, due to the small value of the claim and high litigation costs or the fear of vexation and the defendant's power. Also, collective redress proceedings ensure cessation of illegal behaviour regardless of the concrete harm suffered by members of the group. Hence, the specific aim of collective redress proceedings influenced differentiation between its features and the features of individual civil proceedings.
- There are no provisions on case management, or provisions on limitation of certain dispositions of associations or their additional approval by the court.
- No out of court collective redress/only judicial collective redress. Although Article 109 ZPP provides for a possibility of initiating conciliation procedure at the conciliation centre before initiating consumer collective redress proceedings, no such proceedings have been initiated so far.
- Unlike the provisions on standing under ZSD and ZPP which provide an open formula and are therefore compatible with Recommendation's principles, the provision on standing under ZPP limits standing in consumer collective redress proceedings to certain persons and entities, including 4 ministries and only 2 consumer associations. The standing of Ministry of Economy could be estimated as especially problematic, since the Ministry is entrusted with Croatian economic policy, including ensuring of better conditions to traders regarding business activities and investments. Namely, it cannot be expected that the Ministry of Economy will be active in initiating proceedings against traders, since the question of conflict of interest could be raised. Hence, the present inactivity of the Ministry in initiating consumer collective redress proceedings can be easily understood.
- There are no provisions on litigation funding in Croatian legal system. Reason can be found in the fact that there is no possibility of seeking compensation of damages, so it is perceived that there is no great danger of abusive litigation. However, Article 502h ZPP provides a possibility for the natural or legal person against which collective redress proceedings have been initiated to bring a claim or a counterclaim and seek determination that his/her behaviour did not harm/does not harm collective interests and rights. Also, he/she may

seek prohibition of certain behaviour, especially public appearances of the defendant, compensation of damages and publication of the text of the judgment in the media, at the expense of the defendant.

- No specific provisions on admissibility. Ordinary procedural rules apply according to which the court verifies if prerequisites concerning the court, the parties and the subject matter are met in order for the proceeding to be continued. In Franak case the court initially dismissed the representative action brought by association Franak for reasons of lack of standing. Only after association Franak linked to association Potrošač that was qualified to initiate collective redress proceedings, the court declared the case admissible.
- Case management rules are not provided under the legal framework for collective redress proceedings. Such rules are not provided under the ordinary procedural rules in Croatian legal system either. Although there were suggestions from the academics that such rules would enhance the efficiency of court proceedings, by reducing time and cost of the proceedings, they were not accepted.<sup>200</sup>
- Franak case may be used as an example of the lack of rules and principles for collective redress proceedings which would ensure timely, not expensive, fair and equitable proceedings. Namely, due to the fact that ordinary procedural rules applied, instead of specific rules which would require expedient conduct of proceedings, the requirement of timely and not expensive proceedings has not been met. Also, due to the fact that the judgment of the first instance court was appealed and also proceedings upon revision was initiated at the Supreme Court of Croatia, the collective redress proceedings in Franak case cannot be considered fair or equitable either. The same can be said for Marković and Mamić cases as well, which were also appealed and taken to Supreme Court of Croatia for revision. Although these cases concerned very straightforward issues (a public statement), they lasted for over 2 years.
- For now, provisions on cross-border collective redress are only available under ZZP. Availability of cross border consumer collective redress derives from Article 107 ZZP on qualification of bodies and persons to initiate proceedings for protection of collective interests of consumers (presented under b. Standing). There are no provisions under ZSD on cross-border collective redress, which implies that it is not available for antidiscrimination cases. Also, there are no provisions under ZPP which would apply subsidiary and allow for anti-discrimination cross-border collective redress, regardless of the fact that there are no rules under the ZSD.
- Expediency of proceedings initiated by a representative action is only required under ZSD for anti-discrimination cases. In other collective redress proceedings, ordinary procedural rules apply.
- A sanction against the losing defendant in a form of a fixed amount which the court orders the defendant to pay at the request of the plaintiff, if he fails to comply with the injunctive order or for each day's delay is only prescribed under Article 116/2 ZZP.

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<sup>200</sup> Uzelac A. (2014), p. 62-63. Poretti P. (2014), pp. 612-625.

### **c. Problems relating to access of justice/fairness of proceedings**

The lack of principles specifically created for injunctive collective redress proceedings and the fact that there is no compensatory collective redress available under Croatian law constitute restrictions on *access to justice in* collective redress proceedings. Also, the fact that injunctive collective redress proceedings rely on ordinary procedural rules which create difficulties in affording *access to justice* in Croatian legal system should also be taken into account. There are 4 systematic obstacles to *access to justice* in Croatian legal system which negatively affect collective redress proceedings.

- Slow and inefficient court proceedings

The characteristic feature of Croatian civil proceedings are delays which happen even in cases of small value or minor social significance (small claims procedure). Also, cases in which the court should conduct the proceedings expediently, such as trespassing, are known to last several years. Due to the complexity and high social significance as well as a large number of members of the group which will finally be affected by the judgment delivered in collective redress proceedings, it should be expected that the proceedings will even last longer than individual civil proceedings. Even after a judgment has been rendered in collective redress proceedings, it is to be expected that individual proceedings over compensation of damages which will be initiated subsequently, will result in years of litigation.<sup>201</sup>

- Availability of legal remedies which impede finality and prevent final enforcement

As mentioned earlier, in Croatian legal system almost every single judgment is appealed and taken upon revision to the Supreme Court of Croatia. Hence, first instance judgments were thought to be only an indication, without a final and binding effect. Given the duration of proceedings of higher court, as seen in the presented collective redress cases, it might take years before a judgment becomes final and binding. And that is, only, if the higher court does not decide to remit the case and 'give it another try'. After the judgment becomes final and binding, the battle for the enforcement of the judgment, which can be equally long, begins.<sup>202</sup>

- No specific rules for mass claim proceedings

The fact that Croatian legal system is not equipped with the necessary tools for organisation and conduct of complex mass claim litigation has already been mentioned. This especially concerns the lack of flexibility of judges in applying rules and practices, absence of teamwork or at least collaboration between judges and their advisors, and the fact that rules on case management are more adjusted to the traditional forms of multi-party litigation within individual civil proceedings.<sup>203</sup>

Although joinder of parties provides for a possibility of resolving disputes of a number of individuals in the same proceedings, it is not adequate for mass litigation. Economical and social significance of the potential defendant (large company, employer etc.) often leaves the individual reluctant to initiate individual proceedings. At the same time, joinder of parties requests participation of all individuals as parties in the proceedings. The same rule applies to consolidation of proceedings. In this sense, collective redress

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<sup>201</sup> Uzelac A. (2014), p. 61-62.

<sup>202</sup> Uzelac A. (2014), p. 62.

<sup>203</sup> Uzelac A. (2014), p. 64-65.

mechanisms which ensure a possibility for a representative to initiate proceedings on behalf and in the name of the members of a group present a more appropriate procedural device for mass litigation. A further obstacle to the possibility of use of consolidation of proceedings for resolving mass claims stems from the requirement that all claims should be pending at the same court. However, rules on jurisdiction for individual disputes would not necessarily provide for all of them to be initiated at the same court. Also, even if they were all brought to the same court, there is no guarantee that the individual claims would be brought simultaneously.

- Inadequacy of joinder mechanisms

Although joinder of parties provides for a possibility of resolving disputes of a number of individuals in the same proceedings, it is not adequate for mass litigation. Economical and social significance of the potential defendant (large company, employer etc.) often leaves the individual reluctant to initiate individual proceedings. At the same time, joinder of parties requests participation of all individuals as parties in the proceedings. The same rule applies to consolidation of proceedings. In this sense, collective redress mechanisms which ensure a possibility for a representative to initiate proceedings on behalf and in the name of the members of a group present a more appropriate procedural device for mass litigation. A further obstacle to the possibility of use of consolidation of proceedings for resolving mass claims stems from the requirement that all claims should be pending at the same court. However, rules on jurisdiction for individual disputes would not necessarily provide for all of them to be initiated at the same court. Also, even if they were all brought to the same court, there is no guarantee that the individual claims would be brought simultaneously.

## **II. Sectoral Collective Redress Mechanism(s)**

For the court to allow a representative action under the ZSD an association, institution or other organisation as a plaintiff has to prove to a level of probability that the defendant's actions could discriminate against a greater number of persons who belong to a group with specific characteristics.

If there are no special provisions on gathering of evidence and the burden of proof for representative action under the ZPP and the ZSD, the ordinary procedural rules apply (Article 122 ZPP; Article 24/3/4 ZSD).

Although both sectoral collective redress mechanisms provide for the abstract legal protection of a group, nevertheless they can be differentiated from one other in terms of rules on standing, main procedural rules and the consequences of the judgment for the defendant.

### **A. Consumer law**

Under Article 108/1 ZPP persons and entities entitled to initiate consumer collective redress proceedings are obligated to inform in writing a trader or another person that proceedings will be initiated against him/her in case the illegal practice is not ceased.

Before the consumer collective redress proceedings are conducted, parties are free to initiate a mediation procedure in order to agree a settlement (Article

109/1 ZPP). However, the mediation procedure is a voluntary element, which in no way influences the availability of a judicial consumer collective redress.

## **1. Procedural Framework**

### **a. Competent Court**

Commercial courts as specialized courts have subject-matter jurisdiction over consumer collective redress proceedings (Article 110/1 ZPP). The court at the registered seat (sjedište) of the defendant has territorial jurisdiction, and if the defendant does not have a registered seat, the court at the defendant's domicile (prebivalište) has territorial jurisdiction (Article 110 para 2 ZPP).

In consumer collective redress proceedings initiated against a person which does not have general territorial jurisdiction<sup>204</sup> in Croatia, commercial court at the place where provisions of Article 106/1 ZPP have been or might have been infringed, that is, commercial court at the place where harmful consequences or damages have occurred has territorial jurisdiction (Article 110/3 ZPP).

### **b. Standing**

General rule on entities and persons entitled to bring a representative action under ZPP applies in national and cross-border disputes (Article 107 ZPP). Entities and persons with justified interest in consumer collective redress such as consumer associations and state entities competent for consumer protection may bring a claim for protection of collective interests and rights (Article 107/1 ZPP).

The wording of Article 107 ZPP provides the term "justified legal interest". However, this provision should be read in connection with the subsequent provision (Article 107/2 ZPP) according to which the Croatian Government will deliver a decision and determine entities and persons entitled to initiate consumer collective redress proceedings before the court which has jurisdiction in the matter (who have the "justified legal interest"). Hence, it could be said that the „justified legal interest" of those persons and entities who are entitled to initiate proceeding is determined by the legislator (in this case, the Government). However, there is no list or case law on which the legislator based its decision to entitle certain persons or entities to initiate proceedings. At a request of a minister responsible for consumer protection, the Government of the Republic of Croatia will deliver a decision and determine entities and persons entitled to initiate consumer collective redress proceedings before the court which has jurisdiction in the matter (Article 107/2 ZPP). Also, the criteria which were regarded as relevant by the Government for entitling certain persons and entities to initiate proceedings are not provided in the legislation and are not based in the case law (due to the fact that so far, only one proceedings were conducted in Croatia).

The Decision on entities and persons entitled to initiate proceedings for collective protection of consumer interests (Official Gazette 105/14) (Odluka o određivanju tijela i osoba ovlaštenih za pokretanje postupaka za zaštitu

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<sup>204</sup> Underlined by the author. There is no general territorial jurisdiction *of a person* under Croatian law, and hence, this is a mistake. Instead of general territorial jurisdiction *of a person* it should say that "in cases in which under the ordinary rules on jurisdiction there is no general territorial jurisdiction *of a Croatian court* over a person".



kolektivnih interesa potrošača) (hereinafter; the Decision) was delivered on August 29, 2014 which authorised 4 government ministries - 1. Ministry of Economy, 2. Ministry of Finance, 3. Ministry of Maritime, 4. Ministry of Health and 5. Agency for Electronic Media (HAKOM), 6. Croatian Union of Consumer Protection Organisations-Potrošač and 7. Union of Organizations for Protection of Croatian's Consumers to initiate consumer collective redress proceedings. Persons and entities entitled to initiate consumer collective redress proceedings under the Decision are not required to prove their administrative and financial capacity. The qualification of governmental ministries as entitled bodies for initiating collective redress proceedings is also not in line with the Directive 2009/22/EC which requires that qualified bodies are independent (Article 3 Directive 2009/22/EC).<sup>205</sup>

At a request of a minister responsible for consumer protection, the Government of the Republic of Croatia will deliver a decision and determine entities and persons entitled to initiate consumer collective redress proceedings before a body of a Member State which has jurisdiction in the matter (Article 107/3 ZPP). This decision will be delivered to the European Commission at a request of entities and persons entitled to initiate consumer collective redress proceedings under Article 107/3 ZPP.

If a conduct of a certain trader or a group of traders with a registered seat in Croatia is contrary to provisions of ZPP or other laws provided under Article 106/1 ZPP and is of influence or may be of influence on the position of consumers in a Member State, proceedings under Article 106/1 ZPP can be initiated by an association or other independent state body from the Member State entitled to initiate consumer collective redress proceedings under the laws of the Member State (Article 107/5 ZPP).

Consumer collective redress proceedings can be initiated against a trader with a registered seat outside Croatia, if his/her conduct infringes laws provided under Article 106/1 ZPP (Article 107/6 ZPP). Foreign persons under para 5 (associations or other independent state bodies from a Member State) are entitled to initiate the proceedings, if they are included in the list of bodies and persons entitled to initiate consumer collective redress proceedings published in the Official journal of the European Union (Article 107/7 ZPP).

### **c. Availability of Cross Border collective redress**

Provisions on cross border consumer collective redress in ZPP are rather scarce. Availability of cross border consumer collective redress derives from Article 107 ZPP on qualification of bodies and persons to initiate proceedings for protection of collective interests of consumers (see under b. Standing). Under Article 107/5 ZPP foreign plaintiffs are entitled to initiate cross border consumer collective redress proceedings in Croatia. However, under Article 107/5 ZPP, this possibility is limited to proceedings initiated against traders or group of traders with registered seat in Croatia whose conduct is contrary to provisions of ZPP or other laws provided under Article 106/1 ZPP. The provision is in line with Article 4 Regulation Brussels I bis/Article 2 Regulation Brussels I which grants jurisdiction to the court at the domicile of the defendant. In this case 'domicile' of traders as legal persons under Article 63 Regulation Brussels I bis/Article 60 Regulation Brussels I is at the place of statutory seat, central administration or principle place of business. Nevertheless, the fact that the possibility of initiating cross border collective redress proceedings against traders or group of traders is linked to the

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<sup>205</sup> Uzelac A. (2014), p. 59. Poretti, P. (2015) p. 1006.

infringement of provisions of national consumer law (as provided under Article 106/1 ZZP) could, in practice, limit its availability or their scope.

**d. Opt In/ Opt Out**

As already explained, (see under II. General Collective Redress Mechanism) compensatory collective redress is not available. The representative action under ZZP, allows only for injunctive relief which is obtained in proceedings initiated by qualified bodies or persons listed in the Decision. With no group action aimed at compensation of damages, opt-in and/or opt-out option are not available.

**2. Main procedural rules**

**a. Admissibility and certification criteria**

Under the relevant proceedings, there are no special requirements regarding admissibility and certification criteria. During the stage of preliminary examination of the claim, along with the verification if ordinary conditions for conducting proceedings are met, the court will also examine if a person or a body entitled to initiate consumer collective redress proceedings informed in writing a trader or another person that proceedings will be initiated against him/her in case the illegal practice is not ceased (Article 108/1 ZZP).

**b. Single or Multi-stage process**

Proceedings initiated by a representative action under ZZP are single-stage process consisting of the preparation of the main hearing and the main hearing. Once a judgment has been rendered in the consumer collective redress proceedings, members of a group are entitled to initiate individual proceedings seeking damages, on the basis of a declaratory judgment establishing liability of the defendant.

**c. Case-management and deadlines**

There are no special rules which cover issues such as deadlines and case-management in consumer collective redress proceedings under ZZP. Thus, ordinary procedural deadlines which are not necessarily suitable for proceedings aimed at abstract protection of collective interests of consumers apply. Also, in these proceedings no specific case management tools are available.

**d. Expediency (particularly in injunctive cases)**

There are no special provisions on expediency of consumer collective redress proceedings under ZZP.

**e. Evidence/discovery rules**

In consumer collective redress proceedings initiated against a defendant whose behaviour is contrary to provisions of separate acts on administrative matters (Article 4/1 ZZP), provisions on consumers contractual relationships (Articles 39 and 40 ZZP), obligations of the trader concerning information (Article 42 ZZP), obligations stemming from the contract (Articles 44-48 ZZP) and conclusion of off-premises and of distance contracts (Article 57-79 ZZP) the trader (as a defendant) has to prove that he/she delivered preliminary information to the consumer, that is, that he/she respected the timelines for

fulfilment of contractual obligations (Article 111/1 ZPP). If proceedings are initiated because of infringement of provisions on conclusion of distance contracts on sales of financial services (Articles 80-94 ZPP) the trader (as a defendant) has to prove that he/she delivered preliminary information to the consumer and that he/she agreed on concluding a contract, that is, agreed on the trader's delivery of contracted obligation before expiration of the timelines for unilateral termination of the contract (Article 111/2 ZPP). If under distance contract on sales of financial services burden of proof in regard to facts is on the consumer, this is considered to be unfair contract term (in the sense of part III. head II. ZPP).

If proceedings are initiated because of infringement of provisions on unfair commercial practices (Articles 30-38 ZPP), when determining if commercial practice is unfair the court will not take into account if the practice at hand caused damages to anyone, that is, is it probable that damages will be caused to anyone, and also, if the trader against who proceedings are initiated is guilty for unfairness of commercial practice (Article 112 ZPP).

In proceedings initiated because of infringement of provisions on unfair commercial practices, if the court finds it appropriate, given the circumstances as well as legitimate interests of a trader, it will request that within 7 days the trader delivers evidence which confirm veracity of factual statements presented under the framework of his/her business practice. If the evidence have not been delivered on time, or the court finds the evidence incomplete or insufficient, factual statements presented under the framework of business practice are considered false (Article 113 ZPP).

#### **f. Interim measures**

Before a judgment has been rendered, a court may order an interim measure in order to stop actions contrary to consumer protection provisions under Article 106/1 ZPP.

The court may order an interim measure without verifying if prerequisites for ordering of interim measure for securing non-monetary obligations (to do, to tolerate or to omit) under OZ have been met (Article 346 OZ). These prerequisites include:

- a) There is probable cause that, without the measure, the defendant will prevent or make the collection of the claim significantly difficult by changing the pre-existing conditions
- b) An interim measure is necessary for removing danger of irreparable danger or stopping violence.

#### **g. Court directed settlement option during procedure**

Since there are no special provisions on reaching a settlement in consumer collective redress proceedings, ordinary procedural rules under Articles 321 and 322 ZPP apply.

#### **h. In case of out of court settlements: judicial control**

Before initiating consumer collective redress proceedings the parties may initiate conciliation at conciliation institution in order to reach an out-of court settlement (Article 109/1 ZPP). There are eight conciliation institutions (centar za mirenje): Conciliation Centre of the Croatian Chamber of Economy, Conciliation Centre of the Croatian Chamber of Trades and Crafts, Conciliation Centre of the Croatian Employers' Association with specialized Conciliation

Centre in Banking, Independent Service for Social Partnership, Conciliation Centre of the Croatian Insurance Bureau and Conciliation Centre of the Croatian Association for Conciliation.<sup>206</sup>

Conciliation is conducted according to Conciliation Act (hereinafter: ZM) (Official Gazette 18/11) and Ordinance on conciliation (Pravilnik o mirenju) (Official Gazette 140/09). There are no provisions on judicial control of out-of-court settlements reached in conciliation at the conciliation institution under ZP. To that extent, only provisions of the ZM apply, according to which the out-of-court settlement reached in conciliation has a binding effect for the parties (Article 13 ZM). In consumer proceedings conciliation may only be pursued before collective redress proceedings has been initiated. In regard to limitation period, general procedure rules apply and hence, according to Article 241 ZOO limitation period should be suspended if conciliation is pursued before the centre for mediation.

### **3. Available Remedies**

Qualified entities and persons cannot bring a claim aimed at compensation of damages in consumer collective redress proceedings under ZP. There is only a possibility for the consumers to seek damages in subsequent individual proceedings, on the basis of a judgment rendered in collective redress proceedings declaring that consumer protection provisions under Article 106/1 ZP have been infringed. Namely, in individually initiated proceedings over damages the court is bound by determination that consumer protection provisions have been infringed (Article 118 ZP).

Ordinary procedural rules apply in individual proceedings over damages. In this sense the same as under II. General Collective Redress Mechanism applies. Since punitive damages are not available under Croatian law, there are no provisions on punitive damages in consumer collective redress proceedings under ZP. Also, due to the fact that representative action under ZP is aimed at injunctive relief, there is no need for provisions on extra-compensatory damages. Representative action under ZP does not allow for skimming off the defendant's profits, acquired through his/her illegal practice or behaviour.

Provision of Article 118 ZP which provides for a binding effect of a judgment rendered in consumer collective redress proceedings on all courts before which subsequent (follow-on individual) proceedings for compensation of damages are initiated opens up the possibility of consumers to rely in an injunction in separate follow-on individual proceedings.

Although limitation periods are prescribed by substantive law, there are no special provisions for limitation periods under ZP. Hence, general rules described in detail under II. General Collective Redress Mechanism apply.

### **4. Costs**

#### **a. Basic rules governing costs and scope of the rules**

Under the basic rules governing litigation costs (parnični troškovi), costs include expenses incurred in the course of or due to the proceedings (Article 151/1 ZPP). They also include remuneration for the work of attorney-at-law

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<sup>206</sup> Garašić J. (2014) p. 409.

and other persons to whom the law recognizes the right to remuneration (Article 151/2 ZPP). Each party shall cover, in advance, the costs he/she incurred as a result of his/her action (Article 152 ZPP). According to the basic principle, a party who loses a case completely reimburses the costs of the winning party and his/her intervener ('the loser pays principle') (Article 154/1 ZPP). If a party is partially successful in his/her litigation, the court may order with respect to the success achieved that each party bear their own costs or the court may order for one party to pay the other and his/her intervener a proportional share of the costs (Article 154/2 ZPP).

#### **b. Loser Pays Principle (and exceptions from it)**

Under Article 122 ZPP, to matters not regulated in detail by provisions of ZPP on consumer collective redress proceedings, the ordinary procedural rules under ZPP apply. Hence, in consumer collective redress proceedings under ZPP, the basic 'loser pays principle' applies and rules previously presented under I. Overview and II. General Collective Redress Mechanism are relevant.

### **5. Lawyers' Fees**

#### **Availability (or not?) of contingency fees and their conditions**

As already mentioned, contingency fee agreements between the party and his/her lawyer are only permitted in property matters up to a max 30 % of the awarded amount. Since general principles on lawyer's fees apply also to collective redress proceedings under ZPP, there is no possibility for the parties to reach a contingency fee agreement.

### **6. Funding**

There is no litigation funding system available under Croatian law. In Croatia, consumer associations are founded from the government budget but, due the budget cuts, they are not well funded. Having in mind that initiating consumer collective redress proceedings presents a risk for consumer associations, that in the case they lost, they will have to reimburse litigation cost to the defendant, the institutional financial support is not sufficient for them to actively represent consumer interests before court. Hence, udruga Franak which for now has been the most active association in collective redress proceedings in Croatian legal system raises additional funds by collecting membership fees and donations from the public (citizens/consumers)<sup>207</sup>. Third party funding is not permitted.

### **7. Enforcement of collective actions/settlements**

General framework for enforcement under OZ applies to enforcement of judgments rendered in consumer collective redress proceedings (see under II. General Collective Redress Mechanism).

Enforcement of a judgment rendered in consumer collective redress proceedings prohibiting such or similar unlawful behaviour of the defendant towards consumers, apart from the plaintiff and entitled entities and persons under Article 107/2 ZPP, may be sought by every consumer (Article 117/2

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<sup>207</sup> More information on the membership fee in the association Franak available at <http://udrugafanak.hr/clanstvo/>

ZZP). This provision is aimed at ensuring the broadest possible scope of persons entitled to seek enforcement of a judgment delivered in consumer collective redress proceedings which prohibits illegal behaviour of the defendant, which harms the interests of consumers. This would correspond to the regulatory goals of preventing future misconduct and similar illegal behaviour of the defendant.

However, in a technical sense, this provision is contrary to the provisions of OZ on persons and entities qualified to initiate enforcement proceedings. Under Croatian enforcement law only those persons who were parties to the proceedings would be entitled to initiate enforcement proceedings aimed at enforcement of a judgment rendered in consumer collective redress proceedings by a motion (*prijedlog*). In order for the court to verify that a person initiating the proceeding is qualified and that he/she is initiating enforcement proceeding to enforce his/her claim, the enforcement creditor would have to submit an enforceable court decision (as enforcement title document) from which it is clear that he/she was a party to the consumer collective redress proceedings under ZZP. Given that a natural person is not entitled to participate in consumer collective redress proceedings as a plaintiff, he/she cannot submit such an enforceable court decision. When rendering a judgment in consumer collective redress proceedings, the court only names the parties, and there is no reference to the individual consumers in the judgment, since they are not entitled to bring a representative action under ZZP.<sup>208</sup>

### **Cross border enforcement**

As explained under II. General Collective Redress Mechanism.

## **8. Impact of the Recommendation/Problems and Critiques**

The main features of sectoral collective redress mechanisms undermine their effectiveness in facilitating access to justice. In the field of consumer protection, representative action under ZZP can only be brought by persons and entities entitled to initiate proceedings. The rather short and inconsistent list of 4 governmental ministries and only 2 consumer associations which are entitled to initiate consumer collective redress proceedings under the Decision probably caused the reduction of the volume of litigation in this area. At the same time, the Decision does not authorize the general Ombudsperson office to initiate proceedings. This restriction of *locus standi* was problematic in the Franak case. Namely, due to the lack of *locus standi*, the association Franak had to circumvent the restriction by linking to another association Potrošač that was among the qualified entities in the government list. Although in the first try, the action brought by association Franak was declared inadmissible, in the second try, due to the linking to association Potrošač, it was declared admissible. However, this was just a formal change, because association Franak continued as a main factual claimant which controlled the litigation, issued public statements, provided its own lawyers and financed litigation from its own funds, while Potrošač only acted as the formal plaintiff, bringing the façade necessary for the admissibility of the action.<sup>209</sup>

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<sup>208</sup> Poretti P. (2014), 582-585.

<sup>209</sup> Uzelac A. (2014), p. 60. See also [udrugafanak.hr/index.php/stavoviudruge/item/572-slucaj-franak-sazetak](http://udrugafanak.hr/index.php/stavoviudruge/item/572-slucaj-franak-sazetak)

**a. Impact of the collective mechanism (or lack of) on behaviour/policy of stakeholders (direct/ indirect, economic/social impact)**

The facts of the Franak case is instructive. Franak raised awareness among Croatian consumers, as well as the general public of the problems related to Swiss francs bank loans. Consumers began to join association Franak and to actively participate in activities such as street demonstrations and protests. These measures created a kind of a public pressure which led to the Government joining in order to find an adequate solution. The first measure taken was freezing of the franc exchange rate, after which amendments to the Consumer Credit Act (hereinafter: ZPK) (Official Gazette 75/09, 112/12, 143/13, 147/13, 09/15, 78/15, 102/15, 52716) were introduced in 2015 which enabled conversion of bank loans in Swiss franc to bank loans in euro.<sup>210</sup> After the judgment of the Supreme Court of Croatia was issued, most banks offered consumers conversion of their bank loans to euro. A number of individual proceedings for compensation of damages were initiated against banks, on the basis of findings of the court in collective redress proceedings. It could be argued that Franak case encouraged legislative activity which contributed to stopping illegal practice of the banks and to helping consumers deal with the financial troubles they found themselves in, due to the rapid change and growth of exchange rate of Swiss franc. At the same time, the judgment against banks resulted in banks offering conversion as a means of avoiding litigation. So, it seems that the main strength of collective redress displayed in the case at hand was in the pressure which it can create by claiming cessation of illegal behaviour collectively. As individuals, consumers would be in an unenviable position in proceedings against banks. Or, they would decide against initiating proceedings. As members of a group represented by an association, consumers succeeded in stopping illegal behaviour of banks which is contrary to consumer protection law in Croatia

**b. Problems relating to access of justice/fairness of proceedings including**

Due to the similarity of provisions on representative action under ZPP and ZZP/ZSD a summary of problems and critiques (impact of the Recommendation) is provided under II. General Collective Redress mechanism.

## **B. Anti-discrimination law**

### **1. Procedural Framework**

#### **a. Competent Court**

County courts (županijski sudovi) have subject-matter jurisdiction in the first instance over anti-discrimination collective redress proceedings (Article 24/3 ZSD). The decision of the Croatian legislator to vest jurisdiction in county courts as courts in the first instance is justified by the fact that representative actions are aimed at protecting the rights of a great number of people and that the context of the protection of the right to equal treatment seeks a higher level of court practice harmonisation.<sup>211</sup>

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<sup>210</sup> See [udrugafanak.hr/vodic\\_kroz\\_konverziju/](http://udrugafanak.hr/vodic_kroz_konverziju/)

<sup>211</sup> Uzelac A.(2009), p. 107.

Also, as far as territorial jurisdiction is concerned, ZSD contains rules on special territorial jurisdiction, that is, elective jurisdiction (*forum electivum*). The plaintiff is entitled to choose between the county court that has general territorial jurisdiction (*forum generale*) over the defendant (usually the court of the registered seat of a defendant as a legal entity), the county court that has jurisdiction where the act of discrimination took place or the Zagreb county court (Article 24/3 ZSD). The choice of special territorial jurisdiction was attributed to the strategic aspect of anti-discrimination representative action under ZSD, which facilitates plaintiff's access to court protection by providing him/her with a choice of forum.<sup>212</sup>

#### **b. Standing**

Unlike the relevant rules on qualified entities and persons entitled to initiate consumer collective redress proceedings before the court which has jurisdiction in the matter, which grant standing (*locus standi*) to a very narrow scope of entities and persons (mostly governmental ministries, and only two consumer associations), ZSD prescribes that associations, entities, institutions or other organisations are entitled to bring anti-discrimination representative action under certain conditions ('an open formula'). They should be established in line with prescribed statutory requirements and have a legitimate interest in protecting collective interests of a certain group, or in the scope of their activity deal with the protection of the right to equal treatment (Article 24/1 ZSD).

The broader scope of associations, entities, institutions or other organisations entitled to initiate anti-discrimination collective redress proceedings overlaps to a great extent with the scope of entities and persons entitled to initiate collective redress proceedings under the relevant provisions of ZPP on a general collective redress mechanism. This is in line with the intention of the Croatian legislator to enable a possibility that a plaintiff (association, entity, institution or other organisation) does not bring a claim as a victim of the violation of a right, but as a representative of a group of persons unidentified by name, in the name of the protection of their rights. For the court to allow a representative action under the ZSD an association, institution or other organisation as a plaintiff has to prove to a level of probability that the defendant's actions could discriminate against a greater number of persons who belong to a group with specific characteristics. These provisions are interpreted in the legal literature as granting various sections of the State system *ius standi in iudicio* (procedural legitimation) from the Office of the Ombudsperson to the Office for human rights and potentially, even ministries dealing with, for instance, gender equality or the protection of elderly citizens.<sup>213</sup>

#### **c. Availability of Cross Border collective redress**

No special provisions on cross-border collective redress exist under ZSD. The possibility of cross border collective redress is not provided under the subsidiary legal framework for collective redress contained in ZPP either. Hence, anti-discrimination cross border collective redress is not available in Croatian legal system.

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<sup>212</sup> Uzelac A.(2009), p 107.

<sup>213</sup>Uzelac A. (2009), p. 106.



#### **d. Opt In/ Opt Out**

As already explained (under II. General Collective Redress Mechanism/III. Sectoral Collective Redress Mechanism(s)/Consumer law) in Croatian legal system under the relevant procedures, there is no possibility of seeking compensation of damages. With only representative action aimed at injunctive relief available in anti-discrimination collective redress proceedings, opt-in and/or opt-out option were not introduced under ZSD.

## **2. Main procedural rules**

### **a. Admissibility and certification criteria**

Along with the verification if ordinary conditions for conducting proceedings are met, the court will also examine whether the plaintiff proved to a level of probability that the defendant's actions could discriminate against a greater number of persons most of which belong to a specific group, which can be associated with one of the distinctive characteristics (gender, ethnic belonging, religion, sexual orientation, age etc.).<sup>214</sup>

### **b. Single or Multi-stage process**

Anti-discrimination collective redress proceedings under ZSD are single-stage process consisting of the preparation of the main hearing and the main hearing. The same as explained under II. General Collective Redress Mechanism and III. Sectoral Collective Redress Mechanism(s)/Consumer law applies.

### **c. Case-management and deadlines**

There are no special rules which cover issues such as deadlines and case-management in anti-discrimination collective redress proceedings under ZSD. However, as provided under Article 24/4 ZSD and explained in the legal literature, as far as procedural issues not provided under the relevant rules are concerned, the same rules as for individual anti-discrimination action provided under Article 17/1 ZSD apply.<sup>215</sup> Accordingly, the court may order shorter deadline for the fulfilment of the obligation of the defendant (Article 22 ZSD).

### **d. Expediency (particularly in injunctive cases)**

According to general provisions on procedural issues in individual anti-discrimination action, which also apply to anti-discrimination collective redress proceedings, court and other qualified entities should conduct proceedings in a manner which is expedient (Article 16/3 ZSD). Article 16/3 ZSD contains an instructive rule that court or other entitled bodies should act expediently when conducting proceedings (including collective redress proceedings). This expediency is only reflected in Article 22 ZSD that enforcement is not suspended by appeal and that court may order a shorter deadline for the defendant to comply with the order. There are no other deadlines for submission of case, deadline for defendant response etc, specific for the anti-discrimination collective redress proceedings provided in the relevant legislation (ZSD).

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<sup>214</sup> Uzelac A. (2009), p. 106.

<sup>215</sup> Uzelac A. (2009), p. 107.

#### **e. Evidence/discovery rules**

In anti-discrimination collective redress proceedings, general provisions on burden of proof in individual anti-discrimination action under Article 20/1 ZSD apply. Under the relevant provision, the party claiming that his/her right to equal treatment has been violated (in case of collective redress proceedings, the right to equal treatment of members of a group), he/she has to prove that discrimination occurred. In such case, the burden of proof that discrimination did not occur is on the counterparty.

#### **f. Interim measures**

Before initiating proceedings or in the course of proceedings, at a request of a party, court may order an interim measure (Article 19/1 ZSD). Provisions of OZ apply accordingly (Article 19/2 ZSD).

The court will adopt the request and order an interim measure if certain prerequisites are met:

a) The plaintiff has made it probable that his/her right to equal treatment has been violated. (e.g. there is a serious possibility that the defendant has undertaken discriminatory action/so-called prima facie probability of discrimination)<sup>216</sup>

b) There is a need for ordering an interim measure in order to eliminate the treat of irreparable damage, because a particularly severe violation of the right to equal treatment took place or to prevent violence. These reasons (particularly severe violation) differ from the standard requirements for issuing interim measures under the OZ and authorise the court more extensively to provisionally intervene and order or prohibit certain action before it finally rules on the merits of the plaintiff's claim.<sup>217</sup>

#### **g. Court directed settlement option during procedure**

Since there are no special provisions on reaching a settlement in anti-discrimination collective redress proceedings, ordinary procedural rules under Articles 321 and 322 ZPP apply (explained in detail earlier).

#### **h. In case of out of court settlements: judicial control**

There are no rules on out-of court settlements in collective redress proceedings under ZSD.

### **3. Available Remedies**

#### **a. Type of damages**

Under relevant provisions of ZSD, there is no possibility to seek compensation of damages in anti-discrimination collective redress proceedings. If the plaintiff<sup>218</sup> brought such a claim, the court should reject it as inadmissible. Damages can be obtained in subsequent individual proceedings, on the basis of a judgment rendered in anti-discrimination collective redress proceedings determining discrimination under Article 24/2 ZSD. Namely, in individually

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<sup>216</sup> Uzelac A. (2009), p. 104.

<sup>217</sup> Uzelac A. (2009), p. 104.

<sup>218</sup> Although the legal literature discusses the situations of a "defendant who brings such a claim (for damages)", this is probably a mistake, and it should say plaintiff instead. See Uzelac A. (2009), p. 107.

initiated proceedings over damages, if the court determines that the plaintiff is a member of the group in question, it would not need to deliberate the defendant's liability, but only the existence and amount of damages paid to the plaintiff.<sup>219</sup>

**b. Allocation of damages between claimants for compensatory claims/ distribution methods**

Ordinary procedural rules apply in individual proceedings over damages. In this sense the same as under II. General Collective Redress Mechanism applies.

**c. Availability of punitive or extra-compensatory damages and their conditions**

As already mentioned, punitive damages are not available under Croatian law. Also, due to the fact that representative actions under ZSD are aimed at injunctive relief, there is no need for provisions on extra-compensatory damages.

**d. Skimming-off/ restitution of profits**

In case of representative action under ZSD, skimming off the defendant's profits, acquired through his/her illegal practice or behaviour is not possible, since the action is aimed at injunctive relief only.

**e. Injunctions**

As explained earlier, there is only a possibility to seek injunctive relief under the relevant provisions of ZSD.

**f. Possibility to seek an injunction and compensation within one single action**

It is not possible to seek an injunction and compensation within one single action in anti-discrimination collective redress proceedings under ZSD.

**g. Possibility to rely in an injunction in separate follow-on individual or collective damages actions**

Although there is no provision which provides for a binding effect of a judgment rendered in anti-discrimination collective redress proceedings on all courts before which subsequent individual proceedings for compensation of damages are initiated, subsidiary application of Article 502.d ZPP (general collective redress mechanism) opens up the possibility of consumers to rely in an injunction in separate individual proceedings.<sup>220</sup>

**h. Limitation periods**

Although in Croatian legal system, limitation periods are prescribed by substantive law, there are no special provisions for limitation periods under ZSD. Hence, general rules described in detail under II. General Collective Redress Mechanism apply.

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<sup>219</sup> Uzelac A. (2009), p. 108.

<sup>220</sup> Dika M. (2011), p. 147.

## **4. Costs**

### **Basic rules governing costs and scope of the rules**

As mentioned earlier, the basic rules governing litigation costs (parnični troškovi), costs include expenses incurred in the course of or due to the proceedings (Article 151/1 ZPP). They also include remuneration for the work of attorney-at-law and other persons to whom the law recognizes the right to remuneration (Article 151/2 ZPP). Each party shall cover, in advance, the costs he/she incurred as a result of his/her action (Article 152 ZPP). According to the basic principle, a party who loses a case completely reimburses the costs of the winning party and his/her intervener ('the loser pays principle') (Article 154/1 ZPP). If a party is partially successful in his/her litigation, the court may order with respect to the success achieved that each party bear their own costs or the court may order for one party to pay the other and his/her intervener a proportional share of the costs (Article 154/2 ZPP). Under Article 24/4 ZSD, to procedural issues not regulated in detail by provisions of ZSD on anti-discrimination collective redress proceedings, procedural rules applicable to individual anti-discrimination action under Article 17/1 ZSD apply. Since under Article 17/2 ZSD to individual anti-discrimination action ordinary procedural rules under ZPP apply, the basic 'loser pays principle' applies and all rules previously presented under I. Overview and II. General Collective Redress Mechanism are relevant.

## **5. Lawyers' Fees**

As already mentioned, contingency fee agreements between the party and his/her lawyer are only permitted in property matters up to a max 30 % of the awarded amount. Since general principles on lawyer's fees apply also to collective redress proceedings under ZSD, there is no possibility for the parties to reach a contingency fee agreement.

## **6. Funding**

There is no litigation funding system available under Croatian law. In regard to funding system for associations see more under General collective redress mechanism. In Croatian legal system third party funding is not permitted.

## **7. Enforcement of collective actions/settlements**

### **a. Framework for enforcement**

General framework for enforcement under OZ applies to enforcement of judgments rendered in anti-discrimination collective redress proceedings.

### **b. Efficient enforcement of compensatory/ injunctive order**

Under the relevant rules, the court may decide that the appeal does not withhold the enforcement, which means that the defendant is obliged to comply with the obligations imposed on him/her (e.g. to suspend the discriminatory action) immediately, regardless of the fact that on his/her appeal is yet to be deliberated by a higher court.<sup>221</sup>

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<sup>221</sup> Uzelac A. (2009), p. 105.

In the legal literature it was emphasized that the provision which provides for a possibility that enforcement of a judgment rendered in consumer collective redress proceedings prohibiting such or similar unlawful behaviour of the defendant towards consumers apart from the plaintiff and entitled entities and persons under Article 107/2 ZP may be sought by every consumer (Article 117/2 ZP), should *argumento a similitudine*, enable for the enforcement of a judgment rendered in anti-discrimination collective redress proceedings to be sought not only by the plaintiff (association or other organisation) but by any member of the group in question. However, as previously noted, the provision is contrary to provisions of OZ on persons and entities qualified to initiate enforcement proceedings (Article 3/1 OZ). Hence, most likely the court would not initiate enforcement proceedings at a request of any member of the group.

### **c. Cross border enforcement**

As explained under II. General Collective Redress Mechanism.

## **8. Impact of the Recommendation/Problems and Critiques, including**

### **a. Impact of the collective mechanism (or lack of) on behaviour/policy of stakeholders (direct/ indirect, economic/social impact)**

Anti-discrimination collective redress proceedings had a certain impact on the behaviour of the stakeholders as well, especially in the field of protection of rights of LGBTQ persons. As explained in the legal literature, technically, the consumer collective redress mechanism was supposed to be the 'big brother' of mechanism under the ZSD, but it was overshadowed by the anti-discrimination cases. In fact, for about eight years there was no representative action under ZP, whatsoever, for various reasons. Instead, it seems that mechanisms of collective redress have been used for the most part by LGBTQ persons.<sup>222</sup> Success in litigation manifested in publication of judgments which contributed to raising the level of awareness in the society on which statements and comments represent discrimination of LGBTQ persons. Although there are no objective and accurate data, it could be argued that the prohibition of further illicit practice had a deterrent effect, since there were no similar statements recorded in the media since.

### **b. Problems relating to access of justice/fairness of proceedings including**

Croatian legal theory suggested that in anti-discrimination cases there should be no possibility to seek revision of the judgment issued in collective redress proceedings. Availability of appeal proceedings at the Supreme Court of Croatia should suffice in order for the Supreme Court to rule on the interpretation and application of anti-discrimination law which would be significant for ensuring unique and harmonized application of law and equally of all citizens. But, due to the fact that judgments of the courts in the second instance in Marković and Mamić cases were contrary to each other, although they concerned the same subject matter, the judgment of the Supreme Court of Croatia upon revision in Mamić case finally gave a welcome interpretation of the anti-discrimination law, harmonizing the approach taken to the approach taken in Marković case.

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<sup>222</sup> Uzelac A. (2014) p. 59., Poretti P. (2015), p. 927-928.

Due to the similarity of provisions on representative action under ZPP and ZZP/ZSD a summary of problems and critiques (impact of the Recommendation) is provided under II. General Collective Redress mechanism.

### III. Information on Collective Redress

#### 1. National Registry

National registry of collective redress actions is not established in Croatian legal system. The lack of a national registry should be attributed to the fact that, so far, possibility of obtaining compensation of damages is not provided under the relevant framework for collective redress proceedings in Croatia, and there are no out-of-court methods either. It was pointed out by academics that possibility of initiating collective redress proceedings for compensation of damages should be introduced along with a registry which would serve as means of informing members of a group whose interest and rights have been infringed on the possibility to opt-in.<sup>223</sup> However, there is no political will for a comprehensive reform of Croatian collective redress mechanisms at the moment.

#### 2. Channels for dissemination of information on collective claims

Channels for dissemination of information on collective claims, so far, have only been used in 'Franak' case. Association Franak used their website (<http://udrugafanak.hr/>) in order to access consumers affected by the mortgage loans in Swiss franc and inform them on the development in consumer collective redress proceedings.

### IV. Case summaries

In regard to anti-discrimination collective redress proceedings under ZSD, official data is incomplete due to the fact that the Ministry of Justice failed to publish forms for monitoring of the collective anti-discrimination cases. However, there are very few final and binding judgments, among which, we were able to find information on 4 cases which will be presented in detail.

Case name	Keywords
Pnz-9/09-80 od 18. srpnja 2011. ispravljene rješenjem istog suda poslovni broj Pnz-9/09-84 od 11. listopada 2011. i rješenjem od 6. svibnja 2014. (judgment of the County court in Zagreb as a first	Jelena Čorić Mudrovčić, anti-discrimination, collective redress, LGBTQ persons, dismissal, nun, primary school

<sup>223</sup> Poretti P. (2014), p. 622.

<p>instance court)</p> <p>Gž 10/15-3 (judgment of the Supreme court of Croatia as a second instance-appeal court)</p> <p><b>Reference</b></p> <p><b>Subject area</b></p> <p>The judgment was delivered in the area of anti-discrimination.</p> <p>[eg.consumer]</p> <p>[competition]</p> <p>[environment] [etc.]</p>	<p><b>Summary of claims</b></p> <p>The plaintiff (associations Kontra and Iskorak) requested that it be determined that the defendant's actions (nun Jelena Čorić Mudrovčić) discriminated against gay and lesbian population in Croatia by teaching within her classes of religious education in primary schools that homosexuality is a sickness; that such further teaching be prohibited and that the defendant should publish the judgment determining discrimination in the media on his own cost.</p> <p><b>Findings</b></p> <p>The County court in Zagreb dismissed the representative action based on lack of evidence and on the fact that the nun was essentially teaching the official cathecism. Upon appel, the Supreme court of the Republic of Croatia dismissed the appeal and confirmed the judgment of the County court in Zagreb.</p> <p><b>Outcomes</b></p> <p>The proceedings was concluded by a judgment. However, due to the fact that court dismissed the representative action under ZSD, it did not afford injunctive relief to the plaintiff.</p> <p>Settlement: [yes][no]</p> <p>Remedy: [injunction][damages][both]</p> <p>Amountofdamagesawarded: [in total]+[per claimant]+[as a % ofamountclaimed]</p> <p>Distribution ofdamages:[how]</p>
<p><b>Dispute resolutionmethod</b></p> <p>The dispute was resolved through a court proceedings initiated by a representative action under ZSD.</p> <p>[Group action][testcase]</p> <p>[settlement]</p> <p><b>Court or tribunal</b></p> <p>The proceedings was conducted before court –</p> <p>County court in Zagreb – first instance</p> <p>Supreme court of Croatia as a second instance (appel)</p>	
<p><b>Cross-bordercharacter/ implications, ifany</b></p> <p>This is a national case.</p>	
<p><b>Opt-in/out</b></p> <p>No.</p>	
<p><b>Type of funding</b></p>	

<p>[none][thirdpartyfunding?]</p> <p>Proceedings were funded by the parties, since no third party funding is available under Croatian law.</p>	
<p><b>Costs</b></p> <p>[loser paysprinciple?]</p> <p>Loser pays principle was applied under ordinary procedural rules. The plaintiff was ordered to pay the amount of 12. 377, 00 kuna (approx. 1. 672,56 eur) to the defendant for the costs of the procedure.</p>	
<p><b>Abusive litigation</b></p> <p>[yes][no]</p> <p>No.</p>	
<p><b>Case name</b></p> <p>P-15/2010 (judgment of the County court in Rijeka as a first instance court)</p> <p>Gž 38/11-2 (judgment of the Supreme court of Croatia as a second instance-appeal court)</p> <p><b>Reference</b></p> <p><b>Subject area</b></p> <p>The judgment was delivered in the area of anti-discrimination.</p> <p>[eg.consumer]</p> <p>[competition]</p> <p>[environment] [etc.]</p>	<p><b>Keywords</b></p> <p>Franjo Jurčević, priest, anti-discrimination, collective redress, LGBTQ, internet blog, violence, gay pride</p> <p><b>Summary of claims</b></p> <p>The plaintiff, alliance of gay and lesbian associations (LGBTQ Rights Protection Alliance) requested that it be determined that the defendant's actions (priest Frajo Jurčević) discriminated against gay and lesbian population in Croatia by writing on his internet blog (<a href="http://zupnik.blog.hr">http://zupnik.blog.hr</a>) and praising anti-gay violence against 'perverts' at the Gay Pride in Belgrade; that such further writing be prohibited, that the defendant remove the discriminatory content from his internet blog and that he should publish the judgment determining discrimination in the media on his own cost.</p> <p><b>Findings</b></p> <p>The court found that the defendant discriminated against gay and lesbian population by writing on his internet blog and ordered removal of the content as well as publishing of the</p>
<p><b>Dispute resolution method</b></p> <p>The dispute was resolved through a court proceedings initiated by a representative action under ZSD.</p> <p>[Group action][testcase]</p> <p>[settlement]</p>	



<p><b>Court or tribunal</b></p> <p>The proceedings was conducted before court –</p> <p>County court in Rijeka (first instance court)</p> <p>Supreme court of Croatia as a second instance (appeal).</p>	<p>judgment in the media („Jutarnji list“, „Novi list“) at the cost of the defendant.</p> <p><b>Outcomes</b></p> <p>The proceedings was concluded by a judgment. Due to the fact that the court found discrimination and ordered removal of the content of the internet blog, the representative action under ZSD afforded injunctive relief to the plaintiff in this case. There was no compensation of damages for the plaintiff.</p>
<p><b>Cross-border character/ implications, if any</b></p> <p>This is a national case.</p>	
<p><b>Opt-in/out</b></p> <p>No.</p>	<p>Settlement: [yes][no]</p> <p>Remedy: [injunction][damages][both]</p>
<p><b>Type of funding</b></p> <p>[none][thirdpartyfunding?]</p> <p>Proceedings were funded by the parties, since no third party funding is available under Coatian law.</p>	<p>Amountofdamagesawarded: [in total]+[per claimant]+[as a % ofamountclaimed]</p> <p>Distribution ofdamages:[how]</p>
<p><b>Costs</b></p> <p>[loser paysprinciple?]</p> <p>Loser pays principle under ordinary procedural rules applied. The defendant was ordered to pay the amount of 5.996, 75 kuna (approx. 810,37 eur) to the plaintiffs for the cost of the procedure.</p>	
<p><b>Abusive litigation</b></p> <p>[yes][no]</p> <p>No.</p>	
<p><b>Case name</b></p> <p>Pnz-7/10-2 od 2. svibnja 2011. (judgment of the County court in Zagreb as a first instance court)</p> <p>Gž 25/11-2 (judgment of the Supreme court of Croatia as a second instance-appeal court)</p> <p><b>Reference</b></p>	<p><b>Keywords</b></p> <p>Vlatko Marković, HNS, LGBTQ persons, discrimination, representative action, football</p> <p><b>Summary of claims</b></p> <p>The plaintiff (associations LORI, Zagreb Pride, Domino, Centar za mirovne studije) requested that it be determined that the defendant’s</p>

<p><b>Subject area</b></p> <p>The judgment was delivered in the area of anti-discrimination.</p> <p>[eg.consumer] [competition] [environment] [etc.]</p>	<p>(Vlatko Marković, President of the Croatian Football Federation (HNS) media statements in an interview that ,football players as sick persons would never play for the national team` discriminated against gay and lesbian population in Croatia; that such further statements be prohibited and that the defendant should publish the judgment determining discrimination in the media on his own cost.</p>
<p><b>Dispute resolution method</b></p> <p>The dispute was resolved through a court proceedings initiated by a representative action under ZSD.</p> <p>[Group action][testcase] [settlement]</p> <p><b>Court or tribunal</b></p> <p>The proceedings was conducted before court –</p> <p>County court in Zagreb (first instance court) Supreme court of Croatia as a second instance (appeal).</p>	<p><b>Findings</b></p> <p>County court in Zagreb found no discrimination in the statements, holding that the statements were in fact ,personal opinions` and dismissed the claim. However, the Supreme court reversed the first instance judgment and the defendant had to apologize for the statements and publish the judgment in the media.</p> <p><b>Outcomes</b></p> <p>The proceedings was concluded by a judgment. Due to the fact that the Supreme court of Croatia found discrimination and ordered the defendant to apologize and publish the judgment, the representative action under ZSD afforded injunctive relief to the plaintiff in this case. However, there was no compensation of damages for the plaintiff.</p>
<p><b>Cross-border character/ implications, if any</b></p> <p>This is a national case.</p>	
<p><b>Opt-in/out</b></p> <p>No.</p>	<p>Settlement: [yes][no]</p>
<p><b>Type of funding</b></p> <p>Proceedings were funded by the parties, since no third party funding is available under Croatian law.</p> <p>[none][thirdpartyfunding?]</p>	<p>Remedy: [injunction][damages][both]</p> <p>Amountofdamagesawarded: [in total]+[per claimant]+[as a % ofamountclaimed]</p> <p>Distribution ofdamages:[how]</p>
<p><b>Costs</b></p> <p>[loser pays principle?]</p> <p>Loser pays principle under ordinary procedural rules applied.</p>	

<p><b>Abusive litigation</b></p> <p>[yes][no]</p> <p>No.</p>	
<p><b>Case name</b></p> <p>15Pnz-6/10-27 od 24. ožujka 2011. (judgment of the County court in Zagreb as a first instance court)</p> <p>Gž 12/11-2 od 18. travnja 2012. (judgment of the Supreme court of Croatia as a second instance-appeal court)</p> <p>Rev 300/13-2 od 17. lipnja 2015. (judgment of the Supreme court of Croatia upon revision of the second instance judgment)</p> <p><b>Reference</b></p> <p><b>Subject area</b></p> <p>The judgment was delivered in the area of anti-discrimination.</p> <p>[eg.consumer]</p> <p>[competition]</p> <p>[environment] [etc.]</p>	<p><b>Keywords</b></p> <p>Zdravko Mamić, HNS, LGBTQ persons, discrimination, representative action, football</p> <p><b>Summary of claims</b></p> <p>The plaintiff (associations LORI, Zagreb Pride, Domino, Centar za mirovne studije) requested that it be determined that the defendant's (Zdravko Mamić, informal boss of the Croatian Football club Dinamo) media statements in an interview that 'football players as sick persons would never play for <i>his</i> national team either' (given in connection to the statement of Vlatko Marković, in a previous interview) discriminated against gay and lesbian population in Croatia; that such further statements be prohibited and that the defendant should publish the judgment determining discrimination in the media on his own cost.</p> <p><b>Findings</b></p> <p>County court in Zagreb found no discrimination in the statements, holding that the statements were in fact 'personal opinions' and dismissed the claim. Supreme court of Croatia upheld upon appeal the first instance judgment. However, upon revision of the second instance judgment Supreme court of Croatia reversed the judgment, found discrimination and the defendant had to apologize for the statements and publish the judgment in the media.</p> <p><b>Outcomes</b></p> <p>The proceedings was concluded by a judgment. Due to the fact that the Supreme court of Croatia upon revision of the second instance</p>
<p><b>Dispute resolution method</b></p> <p>The dispute was resolved through a court proceedings initiated by a representative action under ZSD.</p> <p>[Group action][testcase]</p> <p>[settlement]</p> <p><b>Court or tribunal</b></p> <p>The proceedings was conducted before court –</p> <p>County court in Zagreb (first instance court)</p> <p>Supreme court of Croatia as a second instance (appeal).</p>	

Supreme court of Croatia as a court for revision of a second instance judgment	<p>judgment found discrimination and ordered the defendant to apologize and publish the judgment, the representative action under ZSD afforded injunctive relief to the plaintiff in this case. However, there was no compensation of damages for the plaintiff.</p> <p>Settlement: [yes][no]</p> <p>Remedy: [injunction][damages][both]</p> <p>Amountofdamagesawarded: [in total]+[per claimant]+[as a % ofamountclaimed]</p> <p>Distribution ofdamages:[how]</p>
<p><b>Cross-bordercharacter/ implications, ifany</b></p> <p>This is a national case.</p>	
<p><b>Opt-in/out</b></p> <p>No.</p>	
<p><b>Type of funding</b></p> <p>Proceedings were funded by the parties, since no third party funding is available under Coatian law.</p> <p>[none][thirdpartyfunding?]</p>	
<p><b>Costs</b></p> <p>[loser pays principle?]</p> <p>Loser pays principle under ordinary procedural rules applied. Supreme court of Croatia in a judgment upon revision ordered the defendant to pay costs of procedure upon appeal and revision to the plaintiff.</p>	
<p><b>Abusive litigation</b></p> <p>[yes][no]</p> <p>No.</p>	
<p><b>Case name</b></p> <p>26.P -1401/2012 od 4. srpnja 2013. (judgment of the Commercial court in Zagreb as a first instance court)</p> <p>43.Pž-7129/13-4 (judgment of the High commercial court of Croatia as a second instance-appeal court)</p> <p>Rev 300/13-2 od 17. lipnja 2015. (judgment of the Supreme court of Croatia upon revision of the second instance judgment)</p> <p><b>Reference</b></p> <p><b>Subject area</b></p> <p>The judgment was delivered in the</p>	<p><b>Keywords</b></p> <p>Association Franak, Swiss franc, bank loans, representative action</p> <p><b>Summary of claims</b></p> <p>The plaintiff (association for the protection of the interests of consumers of bank loans Franak, through linking to another association Potrošač, that was among the qualified entities on the government list) requested that it be determined that the defendant's (eight commercial banks UniCredit-Zagrebačka banka, Intesa SanPaolo-Privredna banka Zagreb, Erste &amp; Steiermärkische Bank, Reiffeisenbank Austria; Hypo Alpe-</p>

<p>area of consumer protection. [eg.consumer] [competition] [environment] [etc.]</p>	<p>Adria-Bank, OTP Bank, Société Générale-Splitska banka and Sperbank (ex Volksbank)) acted contrary to the to the provisions of the ZZP since they contracted currency clause in Swiss francs while not informing the consumers about the potential risks and that the banks have also violated the provisions by contracting variable interest rate without determining the calculation parameters. They requested that the court orders the bank to enable consumers conversion of their bank loans from Swiss francs to EUR and that the banks change provisions in their contracts on the interest rates.</p>
<p><b>Dispute resolution method</b></p> <p>The dispute was resolved through a court proceedings initiated by a representative action under ZZP. [Group action][testcase] [settlement]</p> <p><b>Court or tribunal</b></p> <p>The proceedings was conducted before court – Commercial court in Zagreb (first instance court) High commercial court in Zagreb as a second instance (appeal) Supreme court of Croatia as a court for revision of a second instance judgment</p>	<p><b>Findings</b></p> <p>Commercial court in Zagreb found that the banks acted contrary to the provisions of the ZZP since they contracted currency clause in Swiss francs while not informing the consumers about the potential risks. The banks have also violated the provisions by contracting variable interest rate without determining the calculation parameters. Interest rates varied according to the one-sided bank decisions without the client being informed about the precise calculation method or parameters used. „This is contrary to the provisions of the ZZP, a violation of the ZOO and the banks are required to reduce the principal to the amount of the domestic currency, Croatian kuna, issued at the beginning of the loan. The interest rate should be applied to the principal calculated in kuna. The applied interest rate should be the same as the one determined at the beginning of loan and it has to be fixed interest rate for the whole repayment period. The judgment of the High commercial court in Zagreb partially reversed the first instance judgment and the second instance judgment was</p>
<p><b>Cross-bordercharacter/ implications, if any</b></p> <p>This is a national case.</p>	
<p><b>Opt-in/out</b></p> <p>No.</p>	
<p><b>Type of funding</b></p> <p>Proceedings were funded by the parties, since no third party funding is available under Croatian law. [none][thirdpartyfunding?]</p>	
<p><b>Costs</b></p> <p>[loser pays principle?] Loser pays principle under ordinary procedural rules applied. Commercial</p>	

<p>court in Zagreb ordered the defendant to pay the amount of 441.875,00 kuna (approx. 59.712,84 eur) to the plaintiff for the costs of the procedure. In the procedure upon revision the Supreme court of Croatia found that due to the partial success of the parties, each should bear its own cost.</p>	<p>confirmed by the Supreme court of Croatia in a procedure upon revision.</p>
<p><b>Abusive litigation</b> [yes][no] No.</p>	<p><b>Outcomes</b> The proceedings was concluded by a judgment. Due to the fact that the Supreme court of Croatia upon revision of the second instance judgment found the claim of the plaintiff partially founded, the representative action under ZZP afforded injunctive relief to the plaintiff in this case. However, there was no compensation of damages for the plaintiff. The judgment did not order compensation of damages to individual loan users (consumers) so they had to bring individual claims against the banks.</p> <p>Settlement: [yes][no] Remedy: [injunction][damages][both] Amountofdamagesawarded: [in total]+[per claimant]+[as a % ofamountclaimed] Distribution of damages:[how]</p>

## CYPRUS – FACTSHEET

### Scope

There is no horizontal collective redress system.

Traditional mechanisms of multi-party proceedings are available (joinder of actions).

A sectoral collective redress mechanism is available in consumer law, solely injunctive.

### **Problems/Incompatibilities with Recommendation principles**

There is no compensatory collective redress.

### **Standing** (Para. 4-7)

The Law confers standing to any "qualified entity", including:

- entities listed in the Commission's list of qualified entities
- and Cypriot qualified entities.

### **Admissibility** (Para. 8-9)

There are no specific rules.

### **Information on Collective Redress** (Para. 10-12, 35-37)

Information can be obtained from the Registrars and the court Registries themselves.

Peer exchange of information between advocates, facilitated by the Cyprus Bar Association and District Bar Associations, is also a working channel.

### **Problems/Incompatibilities with Recommendation principles**

There is no national registry.

Records are still largely not online and often not digitized. At present, the Cyprus court system is undergoing a large-scale reform, with electronic organization of records and cases.

### **Funding (Para. 14-16)**

Claimants may be entitled to legal aid, under the Legal Aid Law 2002.

The notion of third-party funding is alien to Cyprus civil practice (due to a lack of mass claims).

### **Problems/Incompatibilities with Recommendation principles**

There is no legal framework or basis for court control of third-party funding.

### **Cross Border Cases (Para. 17-18)**

The Law enables Community qualified entities to petition the Court. Requirements:

- The entity must be included in the list of qualified organisations prepared by the European Commission published in the Official Journal
- The Court must be satisfied that the applicant entity's purposes justify the filing of an injunction request.

### **Expedient procedures for injunctive orders (Para. 19)**

The court can order the immediate cessation of a violation through interim measures.

### **Efficient enforcement of injunctive orders (Para. 20)**

The general framework, which follows the English common law tradition, is applicable: in case of noncompliance, contempt of court and/or monetary fines apply.

### **Opt In/Opt Out (Para. 21-24)**

Not applicable. The representative entity brings claim in its own right to request an injunction.

### **Collective ADR and Settlements (Para. 25-28)**

Pre-trial, the Law requires the representative entity to ask the infringer to cease the infringement. After 14 days, the qualified entity may apply to the Court for an injunction. This requirement is waived if circumstances dictate the immediate commencement of court proceedings (discretion of the Court).

During the procedure, in practice, the judge may encourage the parties to settle, but no legal basis so far.

### **Problems/Incompatibilities with Recommendation principles**

No appropriate collective ADR mechanism available.

### **Costs (Para. 13)**

The 'loser pays' principle applies.

**Lawyers' Fees** (Para. 29-30)

Lawyers' fees may be agreed upon between lawyer and client. If no such agreement exists, the rates in Procedural Rule apply.

**Problems/Incompatibilities with Recommendation principles**

It is possible to have an agreement providing for contingency fees.

**Prohibition of punitive damages** (Para. 31)

Punitive or exemplary damages are available but rarely awarded.

**Collective Follow- on actions** (Para 33-34)

For an individual damage claim, an injunction in a given case may be relied upon by the aggrieved party.

**Interplay between injunctions and compensation across all sectors**

It is not possible to ask for both injunction and compensation in the same procedure.



# CYPRUS – REPORT

## I. General Collective Redress Mechanism

### 1. Scope/ Type

*De jure*, Cyprus has no **horizontal collective redress system**. Instead groups of claimants may rely on the existing mechanism for joinder of actions under the general norms of civil procedural law. The discussion that follows in this Section therefore considers this general legal framework in terms of its potential application to claims by a group or large number of claimants. Moreover, there has so far been little discussion about reform in the direction of a horizontal mechanism to facilitate collective redress: it would appear that the economic and social factors that might motivate the legal profession or other actors in this regard are lacking until present.

*De facto*, due to the relatively small size – and relatively homogeneous composition – of Cyprus society, there have been coordination efforts of claimants in the most important cases. In some cases, such coordination has taken institutional form (e.g. associations of claimants).

In terms of **remedies** available and/or sought by claimants, Cyprus civil practice places emphasis on compensation (which is characterized as regular remedy, as contrasted to the “specific” or “equitable” remedies such as injunctive relief or specific performance). However, an increasing number of injunctions is sought as remedies, including an increasing number of interim relief requests leading to an increasing number of jurisdictional questions.<sup>224</sup>

### 2. Procedural Framework

#### a. Competent Court

Subject matter for civil claims falls with the District Court (the Cyprus court of general jurisdiction). Trial courts of special jurisdiction include the Family Court and Administrative Court. The Administrative Court has recently (2016) held that actions by public bodies under consumer-protection legislation constitute civil cases thus falling under the jurisdiction of the District Court.

#### b. Standing

Standing for civil claims is determined in accordance with the Courts of Justice Law 1960 and, in principle, the Contract Law (Cap. 149) for contractual claims or the Civil Wrongs Law (Cap. 148) for tort claims under the relevant provisions. Plaintiffs must either have a valid legal claim themselves or have the capacity to represent someone with a valid legal claim under the law. There are no specific provisions, or actual practice, with regard to collective claims.

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<sup>224</sup> See in that regard N. Hatzimihail, “Cyprus” in P. Beaumont et al (eds.) *European private international law in action* (Hart, 2017, forthcoming).

### **c. Availability of Cross Border collective redress**

General procedural rules apply with regard to cross-border claims. Jurisdiction is established under EU private international law or under general common law rules, with regard to third countries or cases falling outside the scope of EU instruments.

### **d. Opt In/ Opt Out**

There is no collective redress mechanism. The issue of opt in / opt out is therefore moot. In terms of possible law reform, apart from the fact that the Recommendation supports Opt In and not Opt Out, any proposal to adopt Opt Out is likely to encounter both political opposition and legal opposition drawing from fundamental rights law such as the interpretation of the right to fair trial.

### **e. Main procedural rules**

**Admissibility and certification criteria:** N/A

**Single or Multi-stage process:** N/A

**Case-management and deadlines:** Order 30 of the Civil Procedure Rules ("Summons for Directions"), which is applicable, was recently (2015) and substantially amended, notably with the setting of deadlines for the filing of court documents.

**Expediency (particularly in injunctive cases):** Injunctions are an established tool of civil litigation in the English tradition. They are addressed ad personam and are supported by the institution of *contempt of court*, in accordance with Article 42 of the Court of Justice Law 1960, which enables the Court to order the immediate imprisonment of addressees who do not obey the order (including company directors).

**Evidence/discovery rules:** Order 28 of the Civil Procedure Rules provides for discovery in the English model. In principle, "any party" may apply for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question therein."<sup>225</sup> The Court has discretion to grant or not such order ("discovery shall not be ordered when and so far as the Court or Judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs") or even to "adjourn" for a later stage, "either generally or limited to certain classes of documents." Order 28 envisions measures to be taken against a party that fails to comply with the Order, including the counsel who "neglects without reasonable excuse to give notice thereof to his client".<sup>226</sup>

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<sup>225</sup> O 28 R 1: "Any party may, without filing any affidavit, apply to the Court or a Judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question therein. On the hearing of such application the Court or Judge may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or make such order, either generally or limited to certain classes of documents, as may, in the Court's or Judge's discretion, be thought fit : provided that discovery shall not be ordered when and so far as the Court or Judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs. If an order is made for discovery, such order shall specify the time within which the party directed to make discovery shall file his affidavit."

<sup>226</sup> O 28 R 14.

**Interim measures:** Article 32 of the Courts of Justice Law 1960 (see below) enables the Court to order interim relief measures.<sup>227</sup> Article 32 is regarded as identical to the identical to section 45 of the English Supreme Court of Judicature Act 1925.<sup>228</sup> The toolbox of interim relief has been substantially expanded in recent years, following modern English civil practice.<sup>229</sup>

**Court directed settlement option during procedure:** In practice, the judge may encourage the parties to settle. So far no legal basis.

**In case of out of court settlements - judicial control:** It is possible to have an agreement before the court, whose content is stated in the court record and is thus given status equivalent to a court order. The court does not exercise any control as to the terms of such settlement.

In practice, counsel may state the parties' intent to settle before the judge.

### **3. Available Remedies**

#### **a. Type of damages**

Cyprus law on damages follows English law. Damages are primarily compensatory. For *contract claims*, the expectation/performance interest is generally compensated. Compensation of the reliance interest constitutes the exception. Restitutionary interest is compensated only in exceptional circumstances. For *tort claims*, actual injury is compensated. Nominal damages are occasionally awarded in instances where a breach of contract or violation of a norm is found but either the actual injury is minimal or there is disapproval of the claimant's conduct.

#### **b. Allocation of damages between claimants for compensatory claims/ distribution methods**

Even in the case of consolidation of claims, the court is supposed to make a separate estimation of damages for each claimant. There is thus no allocation or distribution method properly speaking.

#### **c. Availability of punitive or extra-compensatory damages and their conditions**

Cyprus civil practice follows English law. There is no instance of punitive damages in contract claims. With regard to tort claims, punitive damages are often claimed by plaintiff but infrequently awarded.<sup>230</sup>

#### **d. Skimming-off/ restitution of profits**

Available under English common law rules.

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<sup>227</sup> Art. 32(1) in fine: "Provided that an interlocutory injunction shall not be granted unless the Court is satisfied that there is a serious question to be tried at the hearing, that there is probability that the plaintiff is entitled to relief and that unless an interlocutory injunction is granted it shall be difficult or impossible to do complete justice at a later stage."

<sup>228</sup> See e.g. *Pastella Marine Ltd v National Iranian Tanker Co Ltd* (1987) 1 CLR 583.

<sup>229</sup> See e.g. *Penderhill Holdings Ltd v Abramchyk*, Supreme Court judgment of judgment of 13 Jan 2014 (Civ.App. 319/11).

<sup>230</sup> See e.g. *Attorney-General v Palma*, Supreme Court judgment of 19 Nov 2015 (Civ. App. 44/13).

### e. Injunctions

Court may issue a prohibitive injunction (απαγορευτικό διάταγμα), mandatory injunctions (προστακτικό διάταγμα) in accordance with Article 32 of the Courts of Justice Law 1960 and the principles of equity.<sup>231</sup>

### f. Possibility to seek an injunction and compensation within one single action

It is possible to seek both, depending on the object of the case.

### g. Possibility to rely in an injunction in separate follow-on individual or collective damages actions

An injunction operates, in principle, as between the parties to the case.

### h. Limitation periods

The Prescription of Actionable Rights Law 2012 states the general limitation period for contract and tort claims at six years once the cause of action has been completed.<sup>232</sup> For negligence, nuisance and breach of duty, limitation is set at three years from the completion of the cause of action or the date when the injured party took notice of the injury, if later.<sup>233</sup> For personal-injury claims, the Court is given the discretion to stay limitation for an additional two years in order to allow claimants to overcome incapacity and/or collect the necessary evidence, especially if the defendant has been less than forthcoming.<sup>234</sup>

## 4. Costs

Basic rules governing costs and scope of the rules: Procedural Rule 2008

**Loser Pays Principle (and exceptions from it):** The “loser pays” principle is grounded in case law. Exceptions include petitions for court document modification; *Norwich Pharmacal* orders (the plaintiff pays the respondent’s costs).

## 5. Lawyers’ Fees

Lawyers’ fees may be agreed upon between lawyer and client, in which the agreement is attached to the Retainer deposited at court; if no such agreement exists, the rates states in Procedural Rule apply. It is thus possible to have an agreement stating contingency fees.

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<sup>231</sup> Art. 32(1): “Subject to any Rules of Court every Court, in the exercise of its civil jurisdiction may, by order, grant a mandamus or injunction (interlocutory, perpetual or mandatory) or appoint a receiver in all cases in which it appears to the Court just or convenient so to do, notwithstanding that no compensation or other relief is claimed together or granted together therewith:

Provided that an interlocutory injunction shall not be granted unless the Court is satisfied that there is a serious question to be tried at the hearing, that there is probability that the plaintiff is entitled to relief and that unless an interlocutory injunction is granted it shall be difficult or impossible to do complete justice at a later stage.”

<sup>232</sup> Art. 7(1) of the Prescription of Actionable Rights Law 2012 for contracts, 6(1) for torts. Limitation for defamation is set at one year: 6(4).

<sup>233</sup> Art. 6(2).

<sup>234</sup> Art. 6(3).

## **6. Funding**

Claimants may be entitled to **legal aid**, under the Legal Aid Law 2002, for a variety of cases listed therein and including claims for damages arising out of human-rights violations, cross-border civil and commercial cases and mortgage debtors involved in the sale of mortgaged property.<sup>235</sup>

At present the notion of **third-party funding** is alien to Cyprus civil practice, perhaps due to the lack of mass claims and the unavailability of collective redress mechanisms such as class actions that might have led to such claims. There is no legal framework or basis for court control of such arrangements. Were such funding to be provided, the terms and relationship between claimant and funder would be determined in accordance with general contract law.

## **7. Enforcement of collective actions/settlements**

There is no framework specifically for collective settlements or redress, therefore the general framework, which follows the English common law tradition, is applicable.

Cyprus civil practice has been making increasing use of the tools (notably orders) devised in modern English civil practice in order to ensure that relief is obtained. This includes interim relief measures such as Norwich Pharmacal and Anton Pillar orders.

The system makes use of orders (such as injunctions) addressed in personam. Failure to respect a court order by the person to whom it is addressed will result in the person being held in contempt of court, which has monetary (fine) as well as penal consequences.

Cross border enforcement relies on the general framework of European private international law, notably the Brussels I Regulation (and Lugano II), the European Enforcement Order Regulation etc. For cases falling beyond the scope of EU instruments, cross-border enforcement relies upon international instruments or a common-law action with the foreign judgment or settlement being the cause of action.

## **8. Number and types of cases brought/pending**

There is no collective redress mechanism and no available data.

## **9. Impact of the Recommendation/Problems and Critiques**

The lack of a collective redress mechanism had not been felt until recently. Reasons for this fact included: the – by definition – small numbers of persons interested in a potential claim; the relative geographical isolation of the country (that would not allow, for example, cross-border mass torts such as *Mines de Potasse*); the relative homogeneity of society and the lack of -- spatial and social – distance between power centres and the population at large, both of which factors allowed grievances to be addressed more or less satisfactorily; the existence of an organized, and relatively attentive, bureaucracy and a comprehensive welfare state. Cyprus has only one trial

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<sup>235</sup> Art. 3 in conjunction with Arts. 5(1)(a), 6A and 6E of the Legal Aid Law 2002.

instance and one appellate instance. Unlike England especially, no leave to appeal is required and the right to appeal is frequently exercised. Moreover, court expenses for both trial and appellate process are limited, especially compared to England, and whereas legal fees may vary it is still possible to litigate on the cheap. *In short, the stakes have tended to be qualitatively and quantitatively too low for collective interests to be crystallized in a manner necessitating a specific mechanism for collective redress.*

This state of affairs has been challenged, first by the Mari disaster. The law suits of the victims' estates (relatives) were handled by different judges in distinct law suits, even though the legal position adopted by the various, mostly senior judges of the Nicosia District Court was more or less uniform. A more serious challenge is the ongoing litigation of claims of convertible bond holders, and of the sufferers of the 2013 bank bail-in. A lot of cases are currently pending in these two examples. Efforts to provide a legislative remedy did not bear fruit, due to issues of constitutionality. An important factor to consider in that regard has been the sustainability of Cyprus banks faced with these claims: granting substantive relief may have resulted in the collapse of the entire banking sector with massive consequences given the very high level of private borrowing. In that regard, the convertible bondholders' case shows an antithesis between the "collective" interest of one class and the "public" or "general" interest of the country at large.

As noted above, the lack of a collective redress system has led to a spontaneous or quasi-spontaneous grouping of claimants, from relatives of the victims of the 2005 air crash disaster or the 2011 explosion in the Mari naval base to the vast numbers of convertible bondholders. This system has operated as a functional substitute for a formal mechanism of collective redress, allowing for the exchange of information between claimants and counsel, the consolidation of claims and even facilitating the "opting in" of potential claimants. At the same time, this system has led to rent-seeking behaviour by the self-appointed spokespersons for larger groups (not necessarily in terms of financial compensation for themselves, but in terms of media coverage, development of a political profile and the building of social capital). This is a side effect of the lack of a formal collective redress mechanism. Ironically, it has also given a bad name to the notion of collective redress, even though, unless a U.S.-style model were to be adopted, collective redress is not necessarily going to increase the number of frivolous law suits.

The potential introduction of a collective redress mechanism in Cyprus is not likely to impact adversely the legal system, especially if such law reform is combined with (or triggers, or follows) the modernization of court administration and case management tools and logistics.

## **II. Collective Redress Mechanism(s) in Consumer Protection**

### **1. Scope / Type**

The mechanism established by the Issuance of Court Orders for the Protection of Collective Consumer Interests Law 2007 [L. 101(I)/2007], to which references are made in the Section as "the Law", defines "collective consumer

interests” as “interests that go beyond the mere aggregation of the interests of the individuals prejudiced by the violation in question.”<sup>236</sup> The Law contains, in Annex, a list of the Laws governing the Collective Interests of Consumers, including:

- Unfair Business Practices Laws
- Consumer Rights Law
- Consumer Credit Law
- Radio and Television Stations law
- Cyprus Broadcasting Corporation Law
- Organised Travels, Holidays and Tours Law
- Drugs for Human Use (Quality Control, Supply and Prices) Law
- Unfair Terms in Consumer Contracts Law
- Timesharing Contracts Law
- Certain Aspects of the Sale of Consumer Goods and Pertinent Warranties Law
- Certain Aspects of Information Society Services and Especially E-Commerce and Relevant Matters Law
- Distance Sale of Financial Services to Consumers Law
- Freedom of Establishment of Service Providers and Free Movement of Services Law.

The Law provides only for injunctive relief, i.e. the issuance of prohibitive injunction (απαγορευτικό διάταγμα) or a mandatory injunction (προστακτικό διάταγμα), including interim orders (προσωρινό διάταγμα).<sup>237</sup> Relief consists in the Court ordering an immediate stop of an occurring violation or prohibiting its repetition. Compensatory relief is governed by general provisions regarding civil claims, as discussed above in Section II.

## **2. Procedural Framework**

### **a. Competent Court**

The District Court is competent for the issuance of such injunctions.<sup>238</sup> More generally, the Administrative Court has recently (2016) held that actions by public bodies to enforce consumer-protection legislation constitute civil cases thus falling under the jurisdiction of the District Court.

### **b. Standing**

The Law confers standing to any “qualified entity” (νομιμοποιούμενος φορέας), including both entities listed in the Commission’s list of qualified entities and “Cypriot qualified entities” (κυπριακός νομιμοποιούμενος φορέας)

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<sup>236</sup> Art. 2.

<sup>237</sup> Art. 3.

<sup>238</sup> Art. 3 in conjunction with Art. 2.

### **c. Availability of Cross Border collective redress**

The Law enables Community qualified entities to petition the Court. A formality requirement is that the Court be provided with a copy of the Official Journal of the European Union including the list containing the applicant entity.<sup>239</sup> The Court must be satisfied that the applicant entity's purposes justify the filing of an injunction request in the case at bar.<sup>240</sup>

### **d. Opt In/ Opt Out**

Not applicable. See also Section II 2 d above.

### **e. Main Procedural rules**

**Admissibility and certification criteria:** N/A

**Single or Multi-stage process:** N/A

**Case-management and deadlines:** The new Order 30 sets deadlines.

**Expediency** (particularly in injunctive cases)

**Evidence/discovery rules:** General evidence law, and Order 28 CPR with regard to inspection/discovery is applicable.

**Interim measures:** Interim measures are provided for in the Law. General procedural norms are applicable.

**Court directed settlement option during procedure:** The Law mandates that the applicant entity first enter in consultations with the infringer by asking them to cease and/or refrain from repeating the infringement.<sup>241</sup> If the infringement is not stopped within fourteen days from the initiation of such request, the qualified entity may apply to the Court for an injunction.<sup>242</sup> The consultation requirement is waived if the qualified entity deems that circumstances dictate the immediate commencement of court proceedings<sup>243</sup> (the Court will still have to decide whether this is so).

**In case of out of court settlements: judicial control:** Same as with general cases.

## **3. Available Remedies**

L. 101(I)/2007 concerns injunctive relief. The granting of such relief must be in conformity with the general procedural law described above.<sup>244</sup> Relief may include:

- an order for the cessation or prohibition of any infringement;
- an order for the taking of corrective action within a deadline fixed by the Court.
- an order for the publication of the decision, in full or in part, or the publication of a corrective statement with a view to eliminating the continuing effects of the infringement.

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<sup>239</sup> Art. 4.

<sup>240</sup> Ibid.

<sup>241</sup> Art. 3(2).

<sup>242</sup> Art. 3(3).

<sup>243</sup> Art. 3(2) in fine.

<sup>244</sup> Art. 5(1) and (3).



The Law leaves open the possibility for the injunction to address not simply the specific infringement against specific consumers but also “similar future infringements against consumers in general.”<sup>245</sup> It may also be addressed ad personam against “any participant or accessory” in the infringement, including any “director or managing director or board member or secretary” of a legal person, who has taken part, participated, aided or had any other relation with the infringement.<sup>246</sup>

Individuals injured by the infringement may still pursue their claims in a follow-on action for damages.

**Possibility to seek an injunction and compensation within one single action:** not possible.

**Possibility to rely in an injunction in separate follow-on individual or collective damages actions:** An injunction operates, in principle, as between the parties to the case.

**Limitation periods:** Law states as limitation

#### **4. Costs**

See I.4 above.

#### **5. Lawyers’ Fees**

See I.5 above.

#### **6. Funding**

See I.6 above.

#### **7. Enforcement of collective actions / settlements**

See I.7 above.

#### **8. Number and types of cases brought / pending**

No cases have been brought under this legal mechanism.

#### **9. Impact of the Recommendation/Problems and Critiques, including**

Cyprus has in place an adequate system of collective redress for consumer claims, at least as far as the legislative framework is concerned, which implements EU consumer protection legislation. The system has however not been put to use so far.

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<sup>245</sup> Art. 5(2)(a).

<sup>246</sup> Art. 5(2)(b).

### **III. Collective Redress Mechanism(s) in Competition Protection**

#### **1. Scope / Type**

Protection of individuals for violation of competition norms

Civil protection for individuals “subjected to damage and/or economic harm” by acts or omissions of businesses or groups of businesses acting in violation of the provisions of national competition legislation and/or EU law is provided by general tort law and Article 40 of the Protection of Competition Law 2008. Article 40(1) assumes the existence of a civil action under general law and provides support with regard to evidence. Article 40(2) enables injunctive relief.

#### **2. Procedural Framework**

##### **a. Competent Court**

The District Court is competent for the issuance of such injunctions.<sup>247</sup>

##### **b. Standing**

Cause of action is acknowledged for individuals subjected to damage and/or economic harm” by acts or omissions of businesses or groups of businesses acting in violation of the provisions of national competition legislation and/or EU law. No mention is made to the possibility of group action except under general provisions for joinder of claims.

##### **c. Availability of Cross Border collective redress**

General rules of private international law would apply as discussed in Section II above.

##### **d. Opt In/ Opt Out**

Not applicable. See also Section II 2 d above.

##### **e. Main Procedural rules**

**Admissibility and certification criteria:** N/A

**Single or Multi-stage process:** N/A

**Case-management and deadlines:** Order 30 CPR is applicable.

Expediency (particularly in injunctive cases)

**Evidence/discovery rules:** General evidence law, and Order 28 CPR with regard to inspection/discovery is applicable. Article 40(1) of the Protection of Competition Law states that a final ruling (“τελεσίδικη απόφαση”) by the Cyprus Competition Protection Commission or another competition Authority or the European Commission shall constitute a “rebuttable presumption of the truth of its content.”

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<sup>247</sup> Art. 40 in conjunction with Art. 2.

**Interim measures:** Interim measures are provided for in the general law. General procedural norms are applicable.

**Court directed settlement option during procedure:** In practice, the judge may encourage the parties to settle. So far no legal basis

**In case of out of court settlements: judicial control:** Same as with general cases.

### **3. Available Remedies**

**Type of damages:**

Same as with general cases.

**Allocation of damages between claimants for compensatory claims/ distribution methods:**

Same as with general cases.

**Availability of punitive or extra-compensatory damages and their conditions:**

Same as with general cases.

**Skimming-off/ restitution of profits:**

Same as with general cases.

**Injunctions:**

Court may issue a prohibitive injunction (απαγορευτικό διάταγμα) in accordance with Article 40(2), in order to prevent the continuation of the infringement. Article 32 of the Courts of Justice Law 1960 and the principles of equity forms the general legal basis for injunctive relief.

**Possibility to seek an injunction and compensation within one single action:** not possible.

**Possibility to rely in an injunction in separate follow-on individual or collective damages actions:**

An injunction operates, in principle, as between the parties to the case. An injunction in a given case may be relied upon by the aggrieved party in a damages claim.

**Limitation periods:**

General norms on limitation (i.e. six years) apply.

### **4. Costs**

See I.4 above.

### **5. Lawyers' Fees**

See I.5 above.

## **6. Funding**

See I.6 above.

## **7. Enforcement of collective actions / settlements**

See I.7 above.

## **8. Number and types of cases brought / pending**

No cases have been brought under this legal mechanism.

## **9. Impact of the Recommendation/Problems and Critiques, including**

Cyprus competition law is effectively a decade old. Private enforcement of competition law is a novel concept. This is an area where the institution of collective redress may in the medium term achieve the EU policy objectives.

# **IV. Information on Collective Redress**

## **1. National Registry**

There is no national registry for collective redress claims, given that there is no mechanism for collective redress. A general/national Registry of Civil Actions exists, relying on the District Court Registries, coordinated by the Office of the Chief Registrar of the Supreme Court, who is the head of the administrative service of the judicial service under the supervision of the Chief Justice of the Supreme Court. It must be remarked that, although the administration of civil justice in Cyprus is generally efficient, records are still largely not online and often not digitized. At present, the Cyprus court system is undergoing a large-scale reform, with electronic organization of records and case management being a very important pillar for the improvement of the quality, and transparency, of the administration of justice.

## **2. Channels for dissemination of information on collective claims**

Pending digitization of records and case management, information can be obtained from the Registrars and the court Registries themselves. Peer exchange of information between advocates, facilitated by the Cyprus Bar Association and District Bar Associations, is also a working channel.

# **V. Case summaries**

<b>Case name</b>	<b>Keywords</b>
Relatives of <i>Helios</i> (HCY	

<p>522) air disaster victims</p> <p><b>Reference</b></p> <p>Christodoulou v Attorney-General, Civil suits before the Nicosia District Court, Nos 8641/07 and 8642/07 (rejected: judgment by S Christodoulou S.D.J. on 4 March 2016)</p> <p><b>Subject area</b></p> <p>Tort (personal injury)</p>	<p>Mass tort; liability insurance; air disaster</p> <p><b>Summary of claims</b></p> <p>HCY 522, a plane belonging to a Cypriot airline with a crew of 6 and 115 passengers crashed near Athens</p> <p><b>Findings</b></p> <p>The District Court found that, since the relatives of the victims had received compensation from the insurance company covering Helios Airways Ltd, they lacked standing to bring any further claim t before the court.</p> <p><b>Outcomes</b></p>
<p><b>Dispute resolution method</b></p> <p>Group action</p> <p><b>Court or tribunal</b></p> <p>Court</p>	<p>The actual tort was never litigated in court: the insurance company of Helios Airways Ltd offered compensation for the death of the victims to their relatives. Compensation was accepted. The only precise information about the compensation received by individual claimants concerns the litigants in the cases 8641 and 8642/07, namely €905,625 and €872,960 respectively.</p>
<p><b>Cross-border character/ implications, if any</b></p> <p>The vast majority of claimants, as well as the tortfeasor, were Cyprus citizens or residents.</p>	<p>Victims' relatives were active in the criminal prosecution of the case, both in Cyprus and in Greece (where, unlike Cyprus, the institution of aggrieved civil party to criminal proceedings – “civil action” – exists)</p>
<p><b>Opt-in/out</b></p> <p>N/A</p>	<p>The two actions referred to here were joined in 2015; they concerned claims by the two children of a deceased couple for each of their two parents. The interim judgment disjoined the two suits in order for them to be dismissed.</p>
<p><b>Type of funding</b></p> <p>No funding mechanism</p>	
<p><b>Costs</b></p> <p>Loser pays principle / claimants were charged with the costs</p>	
<p><b>Abusive litigation</b></p> <p>No</p>	

<p><b>Case name</b></p> <p>Relatives of the victims of the explosion that took place in a naval base near Mari against the Republic of Cyprus.</p> <p><b>Reference</b></p> <p>Krokou v Republic, Nicosia District Court, 542/12 (26.5.2016) 1600/12 (28.9.2015) 5605/11 (14.9.2016) 3601/11 (31.5.2016) 3604/11 (19.5.2016) 54/12 (19.5.2016) 6915/11 (17.8.2016) 596/2014 (1.12.2016) 597/2014 (1.12.2016)</p> <p><b>Subject area</b></p> <p>Tort (personal injury)</p>	<p><b>Keywords</b></p> <p>Mass tort; civil claims against government;</p> <p><b>Summary of facts</b></p> <p>A massive explosion occurred on the 11/7/2011 in the Navy Base 'Evangelos Florakis' near Mari when explosive matter inside containers overheated. 13 men were killed, including naval officers, Navy non commissioned officers, enlisted men and firemen.</p> <p><b>Summary of claims</b></p> <p>Victims' relatives, acting as the victims' estates sought:</p> <ul style="list-style-type: none"> <li>- Special damages for estate administration expenses (funerals etc)</li> <li>- Bereavement according to the law</li> <li>- General damages for lost income for the benefit of the depended relatives</li> <li>- Punitive damages due to the gross negligence by the defendant</li> </ul> <p>The cases were not consolidated</p> <p><b>Findings</b></p> <p>During court proceedings the Republic admitted responsibility for the explosion that caused the lives of the 13 men.</p> <p>Besides the exact amount of damages, the Court was called to decide whether or not the amount of €95000 that was instantly granted by the state to the relatives for all their immediate expenses must be treated as a form of compensation and be deducted from the total amount. The Court found that the amount did not constitute any form of compensation.</p>
<p><b>Dispute resolution method</b></p> <p>Group action</p> <p><b>Court or tribunal</b></p> <p>Court</p>	
<p><b>Cross-border character/ implications, if any</b></p> <p>The vast majority of claimants, as well as the defendants, were Cyprus</p>	<p><b>Outcomes</b></p> <p>The Court ordered the defendants to pay damages</p>

citizens or residents.	<p>as follows:</p> <p>In some cases special damages for estate administration fees to the benefit of the deceased's property up to €5000</p> <p>Bereavement at the fixed amount of €17085,90 for each victim</p> <p>Compensation for general damages for future earnings of the deceased for the benefit of those dependent upon them (€409.000-€453.750 divided accordingly to the depended relatives)</p> <p>Compensation for non-pecuniary damages (moral damages) for the unprecedented negligence of the defendants that led to serious violation of human rights (€33.750- €50.000 to each plaintiff who suffered the pain and sorrow of a loss)</p>
<b>Opt-in/out</b>	
N/A	
<b>Type of funding</b>	
No funding mechanism	
<b>Costs</b>	
Defendant (i.e. the Republic) was charged with the cost in all cases	
<b>Abusive litigation</b>	
NO	

<b>Case name</b>	<b>Keywords</b>
Law suit by 51 affected applicants against the Euroean Union alleging non-contractual liability for the substantial reduction in the value of deposits that the plaintiffs had in Bank of Cyprus and Cyprus Popular Bank when the latter two entered into resolution (the 2013 bail in)	<b>Summary of facts</b>
<b>Reference</b>	In 2012, Cyprus Popular Bank and Bank of Cyprus, encountered financial difficulties. The Republic of Cyprus thus considered it necessary for them to be recapitalised and reached an agreement with Eurogroup in that direction. As a result, in 2013, a substantial reduction in the value of the applicants' deposits occurred after the implementation of "bail in" decrees.
K. Chrysostomides & Co. and Others v Council and Others, T-680/13	<b>Summary of claims</b>
<b>Subject area</b>	The applicants claim that the Court should order the EU to pay the amounts lost plus interest accruing from 26 March 2013 until the judgment of the Court plus the costs of the proceedings.
Non-contractual liability	<b>Findings</b>
<b>Dispute resolution method</b>	

<p>Group action</p> <p><b>Court or tribunal</b></p> <p>EU Court</p>	<p>Ongoing</p> <p><b>Outcomes</b></p> <p>Ongoing</p>
<p><b>Cross-border character/ implications, if any</b></p> <p>All claimants in this case were Cypriot. There have been parallel dispute processes by foreign nationals against the Republic of Cyprus in other fora, including investment arbitration, without success.</p>	
<p><b>Opt-in/out</b> Effectively claimants opted in.</p>	
<p><b>Type of funding</b> Claimants funded their own case.</p>	
<p><b>Costs</b> Case is ongoing</p>	
<p><b>Abusive litigation.</b> Despite the small possibility of success, claimants did suffer a substantial material damage.</p>	



# CZECH REPUBLIC - FACTSHEET

## Scope

General procedural tools such as provisions on joinder of claims but no horizontal collective redress mechanism.

Sectoral representative actions (in particular consumer and competition law).  
Extended *lis pendens* and *res iudicata* effect.

Reform plans to introduce a horizontal collective redress mechanism which allows for compensatory collective redress.

## **Problems/Incompatibilities with Recommendation principles**

No proper collective redress regime for compensatory claims

## Standing

Standing for representative actions: associations or professional organisations having a legitimate interest in protecting consumers, or qualified listed entities

## Admissibility

Early determination of admissibility questions

## Information on Collective Redress

Information on injunctions is given by consumer associations. There is no National Registry.

## Funding

No special regulation of funding.

## Cross Border Cases

None in practice.

## Efficient enforcement of injunctive orders

Against unfair competitive behaviour /consumer contract terms, the initiation of proceedings and decision on the merits lead to a wide *lis pendens/ erga omnes res iudicata* effect. This affects rights of others to initiate judicial proceedings in the same case. Potential claimants are not allowed to actively influence the judicial proceedings.

## **Problems/Incompatibilities with Recommendation principles**

Problems with access to justice for individuals

## Opt In/Opt Out

Only representative actions.

## Collective ADR and Settlements

Parties are encouraged to settle disputes consensually or out of court.

## Costs

The loser pays principle applies.

### **Lawyers' Fees**

Contingency fees are permitted. A reasonable contingency fee should generally not exceed 25% of the value of the claim.

### **Prohibition of punitive damages**

No punitive damages.

### **Interplay between injunctions and compensation across all sectors**

N/a. In individual cases involving the same plaintiff and defendant and the same claim, the plaintiff or any other entitled person can rely on an injunction, but this does not automatically guarantee an award of compensation. The advantage would be that in injunction claims the court fees are capped, whereas in compensatory claims fees are proportional to the amount of damages claimed. The disadvantage is that court proceedings typically take a long time.

# **CZECH REPUBLIC - REPORT**

## **I. General Collective Redress Mechanism**

There is no general collective redress mechanism in Czech law beyond traditional rules on joinder, lis pendens or res iudicata. Injunctive relief is provided for in sectoral proceedings, such as in consumer cases.

## **II. Sectoral Collective Redress Mechanism(s)**

### **1. Scope/ Type**

There is special legislation providing for representative actions, regulating the special role of exactly defined subjects (representatives) who have a right to initiate judicial proceedings on behalf of represented groups. Yet those represented groups (e.g. consumers) are not parties to the judicial proceedings. The dispute is resolved by the court as classical contentious proceedings without any real particularities.

The list of special legal acts regulating the status of representatives includes:

- Act No. 634/1992 Coll., Consumer Protection Act
- Act No 89/2012 Coll., Civil Code
- Act No. 221/2006 Coll., on Enforcement of Industrial Property Rights
- Act No. 408/2000 Coll, on the Protection of Plant Variety Rights

The Consumer Protection Act sets out in § 25 that a motion to begin injunctive proceedings concerning the protection of consumer rights may be filed by:

- an association or professional organisation which has a legitimate interest in protecting consumers, or
- an entity set out in a "list of qualified entities", while the right of the court to re-examine if the entity initiating court proceedings is a qualified entity shall remain unaffected. The list of the qualified entities is maintained by the European Commission and published in the Official Journal.

The Czech Republic is authorised to propose the inclusion of new association on the list, providing that this entity:

- has been incorporated in compliance with the laws of the Czech Republic,
- has been active in the field of consumer protection for a minimum of two years,
- is independent and not-for-profit, and
- has duly settled all its financial liabilities to the Czech Republic.

An applicant association shall file its application for inclusion on the list of the qualified entities with the Ministry of Industry and Trade, accompanied with the documents supporting compliance with the abovementioned requirements. If the association meets the requirements, the Ministry of

Industry and Trade shall propose its inclusion on the list of the qualified entities to the European Commission.

ii. The Civil Code (CC) grants specific legal persons the right to initiate representative proceedings in two situations. According to § 2989 para 1 CC such legal person is entitled to defend the interests of competitors or customers via cease and desist orders ending situations of unfair competition.<sup>248</sup> Secondly the CC grants the right to legal persons established to protect the interests of small and medium-sized entrepreneurs to invoke the ineffectiveness of standard contract terms derogating from provisions on the time of performance or the statutory default interest rate if such clauses are grossly unfair (§ 1964 CC, as well § 1972 CC).

iii. According to § 2 para 1 of the Act on Enforcement of Industrial Property Rights, the Right holder or proprietor shall have authority to enforce rights under this act as well as a licensee and a professional organization duly recognized in its country of origin as having authority to represent the industrial property rights holders or proprietors ("Authorized Person").

iv. According to § 26a Act on the Protection of Plant Variety Rights a special professional organization with authority to represent the rightholder (breeder who has been granted plant variety rights) is entitled to file an action as representative body. In the present state of things this entitlement is held by the Variety Owners' Cooperative (<http://www.druvod.cz/langen-5.html>).

## **2. Injunctive or compensatory relief**

In most cases, the only relief that may be granted in proceedings described above is the injunction restraining further defendant's conduct. The recovery of consequential damages takes place in separate proceedings independent of each other. This leads to inefficient use of judicial resources and potentially divergent decisions.

## **3. Procedural Framework**

Proceedings initiated by the authorized legal entity follow classical contentious judicial proceedings. Jurisdiction of the court is determined according to the general criteria set out in the CCP. Only the representative and the defendant are parties to the proceedings. The decision is binding only between the parties (with the exceptions mentioned below). It is possible to conclude a settlement (section 99 CCP). The court shall decide to approve the settlement. It shall not approve it if it infringes the law. The approved settlement has the same effects as a final judgment.

The financing of this type of proceedings is not specially regulated. Legal expenses insurance is regulated in Section 2856 et seq. of Act No 89/2012 Sb., the Civil Code. By a contract covering insurance for legal expenses, the insurer undertakes to pay the insured person's costs which are associated with the assertion of his rights, and provide associated services. These provisions are based on the implementation of Directive 87/344/EEC of 22

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<sup>248</sup> However this right of representative entities is not generally applicable in whole area of unfair competition. CC excludes some special categories of unfair conduct from their disposition, in particular the question of 'free-riding' on the reputation (section 2982 CC), bribery (section 2983 CC), detraction (section 2984 CC) and violation of commercial secret (section 2985 CC).

June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance. Section 2857 of the Civil Code provides that stipulations restricting the insured person's freedom of choice of representative are disregarded. [Article 4(1)(a) of the Directive].

In the Czech Republic, contingency fees are permitted [see Article 10 of the Resolution of the Board of the Czech Bar Association No 1/1997 laying down the rules of professional ethics and competition of lawyers in the Czech Republic (Code of Ethics)]. However, a reasonable contingency fee should generally not exceed 25% (see Article 10(5) of the Code of Ethics).

The paying of judicial costs is governed by the 'loser pays' principle.

Only the parties of the proceedings are entitled to initiate the enforcement of the final decisions.

It is important to stress here, that some of aforementioned special representative actions fall within the scope of § 83 para 2 and § 159a of CCP. This means, that also for this type of proceedings, the rules on *lis pendens* and *res judicata* apply in a broad way. This concerns in particular injunctive proceedings against unfair competitive behaviour and unlawful conduct in consumer law. In these categories of disputes, if the action is brought by a representative body (or a court already made a final decision on the merits in a representative action), the concerned subjects (rightholders) can no longer initiate proceedings or be a party to the present proceedings, but (controversially) the decision is still binding on them (unlike in classical proceedings where the decision is binding only *inter partes*).<sup>249</sup> This broad interpretation of *lis pendens* and *res judicata* limits the right of concerned persons to get the access to court. In all other cases (e.g. protection of the interests of small and medium-sized entrepreneurs, enforcement of industrial property rights and protection of plant variety rights) the classical *lis pendens* principle according to section 83 para 1 CCP applies. This means that initiation of proceedings precludes further proceedings being brought before the court between the same parties (i.e. the plaintiff and the defendant), but any other concerned person may bring an action, ie. there may be several cases involving different claimants on the same subject matter. The Court should join these concurrent proceedings. However, this is not a mandatory. Joining cases is fully in the court's discretion. If there is a previous judgement on the same subject matter, the court must take it into account. It is also in the discretion of the court whether it will adhere to the previous judgement or deviate from it. In latter case, it needs too duly explain why it followed a different reasoning.

#### **4. Impact of the Recommendation/Problems and Critiques, including**

##### **a. Consequences where no collective redress mechanism is available**

The current absence of collective redress mechanisms for individuals is unsustainable. This is also acknowledged by the Ministry of Justice, which has set up a working group on the preparation of legislation on collective redress. According to the Ministry's legislative plan, the draft

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<sup>249</sup> Similarly, if a person concerned (the holder of the right) initiated the proceedings, representative body lost the right to fill the action or become a party to the proceedings.

articles/objectives of the future legislation should be presented in September 2017.

The key points of the draft legislation are:

- The source of inspiration lies in American class action proceedings.
- The material scope of the Act should be general, i.e. it should not be limited to consumers, unfair competition etc.
- All types of claims (i.e. compensation, delay, determination, etc.) should be permissible,
- The procedural legitimization (standing) before the court should be primarily granted to the members (individuals) of the concerned group. The right of associations dedicated to the protection of certain interests to initiate collective redress is also considered.
- The opt-out system should be applied as a general principle. There are discussions about the introduction of an opt-in system for cases in which it would be required by the circumstances (based on the courts discretion and decision).
- Financing/funding of collective redress should be primarily based on private resources.
- A special stage of the proceedings should be introduced in the form of a 'certification' decision. Here the court should make a decision by means of a resolution with the possibility of appeal against it.
- The draft legislation significantly enhances the role of the judge. Judges will have a larger discretion than in "classical" individual proceedings.

#### **b. Problems relating to access of justice/fairness of proceedings**

Currently, the crucial problem is access to court. The wording of § 83 para 2 CCP prevents other plaintiffs bringing actions concerning the same claims resulting from the same conduct against the same defendant.

Those concerned by the proceedings can only participate as interveners. Often, however, they did not receive any information about the fact, that such proceedings were initiated. Nonetheless the decision is binding on them. However, they are not entitled to file a motion for enforcement proceedings in case a defendant fails to fulfil his duties.

Although the rules in the CCP are sometimes referred to as a "collective action" under the CCP, there is no collective protection of rights present here.

### **III. Information on Collective Redress**

#### **1. National Registry**

There is no national registry in the Czech Republic.

## **2. Channels for dissemination of information on collective claims**

Currently, the courts have no duty to publicly inform about the initiation of proceedings. On the other hand, the CCP enables - in matters of rights violated or threatened by conduct of unfair competition, protection of intellectual property rights and in matters of consumer protection - that the court shall be authorised to grant the participant, whose motion was satisfied, upon request and depending on the circumstances of the case, the right to publish the judgement at the expense of the unsuccessful party. The court shall also determine the extent, form and manner of publication (section 155 para 4 of CCP). This ensures that those who wish to take an action for compensation are informed about the outcome of the proceedings.

## **IV. Case summaries**

As there is a serious gap in the legal regulation of collective redress, there are no key cases until now that would be worth mentioning.

# DENMARK – FACTSHEET

## Scope

There is a horizontal mechanism which allows **injunctive** and **compensatory** relief. Other types of mechanisms include joinder of parties and representative actions (which allow **injunctive** and **compensatory** relief)

## Standing (Para. 4-7)

### Class Action

The representative may be:

- (1) a member of the class (private group action),
- (2) an association, private institution or other organisation when the action falls within the framework of the organisation's object (organisational group action), or
- (3) by a designated public authority (public group action).

### Representative action

Requirement of legal interest. When actions are commenced, the court may demand security. Conditions laid down in para. 4 (a)-(c) of the Recommendation are to be satisfied. If any of the conditions are no longer applicable, the representative entity loses their status.

## Admissibility (Para. 8-9)

Class actions can be brought when 7 conditions are met: (1) there is a common claim, (2) there is a venue for all of the claims in Denmark, (3) the court is the venue for one of the claims, (4) the court possesses the requisite expertise to deal with one of the claims, (5) class actions are judged to be the best manner of handling the claims (class action is secondary), (6) the members of the class can be identified and informed of the case in an appropriate manner, and (7) a class representative as per Section 254c of the DAJA can be appointed (see section b). According to case law, the decisive criteria will often be "similar claims" and "the best manner of handling the claims".

## **Problems/Incompatibilities with Recommendation principles**

Deciding on procedural issues, including approval of the class action, size of security and identification of the group, may delay the legal process.

The preliminary stage of a class action takes a very long time and maybe also too long.

## Information on Collective Redress (Para. 10-12, 35-37)

Information is provided in a form specified by the court. That may include that the notification is made in whole or in part via public announcement and the court can require the class representative to carry out the notification. The costs of the notification are paid in the first instance by the class representative.

A summary of all pending class actions in Denmark can be viewed on the Danish Court Administration's website at [www.domstol.dk](http://www.domstol.dk).

## Funding (Para. 14-16)

The group representative may apply for free process for the entire group action to the Department of Civil Affairs. Private legal aid covered by insurance companies possible.

Third-party funding is not prohibited but does not seem widespread in practice. There is no specific regulation.



### **Problems/Incompatibilities with Recommendation principles**

Since third-party funding is self-regulated and not (yet) common, it is not clear whether and how the courts ensure compliance with the Recommendation.

#### **Cross Border Cases (Para. 17-18)**

No limitation as to the nationality of the group members or group representative. The court's decision in class actions based on the Opt Out model only have binding effect on class members who could have been sued in Denmark for the claim in question when the case was first brought.

#### **Expedient procedures for injunctive orders (Para. 19)**

National legislation not requiring to treat claims for injunctive orders with all due expediency. All civil claims (injunction and damages) are treated according to the same general rules in the Danish Administration of Justice Act (Third book). Interim measures are possible

### **Problems/Incompatibilities with Recommendation principles**

No national legislation requiring treatment of injunctive orders with due expediency.

#### **Efficient enforcement of injunctive orders (Para. 20)**

Sanctions for non-compliance with the injunction order possible: Anyone who deliberately violates a prohibition or injunction may be sentenced to a fine or imprisonment for up to 4 months, and in connection with this, be ordered to pay compensation. The size of fines is according to case law between 2000 - 3500 EUR (no max sanction).

All areas covered.

#### **Opt In/Opt Out (Para. 21-24)**

Both the Opt In and Opt Out model is available under Danish law. Only a designated public authority (currently only the consumer ombudsman) may bring an Opt Out class action.

The court sets a deadline for the class members to opt-in or out (exceptions for extenuating circumstances). Opt-Out is only available if it is clear that the claims cannot be expected to be promoted by individual actions, and it is assumed that a group action with registration will not be an appropriate way of dealing with the claims.

#### **Collective ADR and Settlements (Para. 25-28)**

Judicial approval is required for any out of court settlement agreement. The court will approve the settlement unless it discriminates against some class members or is otherwise patently unfair.

#### **Costs (Para. 13)**

Loser pays principle applies, however the court has a wide discretion as to what is "reasonable"

#### **Lawyers' Fees (Para. 29-30)**

Contingency fees are prohibited

#### **Prohibition of punitive damages (Para. 31)**

Punitive or extra-compensatory damages are prohibited.

#### **Collective Follow- on actions (Para 33-34)**

Compensatory collective redress starts only after the final injunction/declaratory decision on a breach of law - Commonly in consumer and competition law.

Compensatory collective redress to avoid conflicting with ongoing injunction/declaratory decision on a breach of law is not always possible.

**Problems/Incompatibilities with Recommendation principles**

Not always possible to wait until the decision from the public authority has become final to commence follow-on claim.

**Interplay between injunctions and compensation across all sectors**

It is possible to seek injunction and compensation within one single class action.

It is possible to rely on an injunction in a separate follow-on individual or collective damages action, if the parties are the same in both cases.

# DENMARK – REPORT

## I. General Collective Redress Mechanism

### 1. Scope/ Type

Class action has been possible under Danish law since 2008 as an in-court procedure based on private (Opt In) or public (Opt In/Opt Out) initiative. Joinder of claims and persons, representative action, including test cases, are also possible under Danish law. A variety of different out of court alternative dispute resolution (ADR) are also available regarding consumer matters.

#### a. Class action

On January 1st, 2008, Chapter 23a of the DAJA came into force. Since then, class action has been possible under Danish law. Chapter 23a of the DAJA is based on the Standing Committee on Procedural Law, Recommendation no. 1468/2005 on class action lawsuits.

The Danish class action scheme is horizontal and – as a starting point - based on the Opt In model. Furthermore, a public body authorised by law may act as a group representative in an Opt Out class action. So far only the consumer ombudsman has been authorised to act as a group representative. The areas where the consumer ombudsman may act as a group representative are specified in and number of different act regarding e.g. advertising, competition and financial regulation.

Access for injunctive and compensatory remedies is available under both the Opt In and the Opt Out model.

#### b. Joinder of parties

According to Section 250 (1) more than one party may sue or be sued in one action (“subjektiv kumulation”). Access to joinder of persons may be relevant to secure uniform decisions and reduce cost, where the evidences fully or partially are the same. The provision is flexible and includes access to both injunctive and compensatory remedies.

Joinder of persons has – as an example – been used in a competition damages cases brought against different undertakings accused of participating in a cartel (U.2016.1656S). The provision is, however, not limited to a specific sector but does apply horizontal.

Each joint claimant or defendant remains a separate party to the proceedings.

#### c. Representative actions

An organisation (e.g. workers union) may act as a represent (“mandatar”) in a test case on behalf of one or more of its members.

It is also possible for the consumer ombudsman to act as a represent on behalf of a consumer in disputes before ordinary courts between a consumer and a business. That is fairly common in Denmark (in contrast to class actions) - especially if a large group of similar claims are pending against the same defendant. As an example see U.2016.1062 Ø, regarding a claim

against a Travel agency. The case was a test case and 833 similar consumer claims awaited the outcome of the decision.

## **2. Procedural Framework**

### **a. Competent Court**

There is no special "Court of class actions". The provisions about the competent courts in the DAJA (chapter 21 and 22) apply to all civil cases, including class actions (and other available collective redress mechanisms).

Under Danish procedural law a case is initiated - as a starting point - either in City Court or the Maritime and Commercial High Court. Under certain conditions a case may start in in High Court with access to direct appeal to Supreme Court.

Decision from City Court and Maritime and Commercial High Court can be appealed directly to the High Court. It is also possible to apply the Supreme Court for direct access to appeal from the Maritime and Commercial High Court.

### **b. Standing**

#### **Class action**

Civil claims submitted on behalf of a number of persons can be considered under a class action. However, class action is not possible in i.e. matrimonial cases, paternity cases and other indispositive cases, including cases leading to status judgments under family law.

Under Section 254c of the Danish Administration of justice Act (the Act), class actions are conducted by a class representative on behalf of the class. The class representative is appointed by the court. The representative may be (1) a member of the class (private group action), (2) an association, private institution or other organisation when the action falls within the framework of the organisation's object (organisational group action), or (3) by a designated public authority (public group action). Currently only the consumer ombudsman has been authorised under (3).

It is only the group representative who is the claimant and therefore a party to the proceeding. Members of the group are not parties to the trial, but rulings are binding for all members of the group.

#### **Joinder of persons**

The normal procedural rules apply. Accordingly, each individual claimant needs to have a legal interest in the outcome of the case.

#### **Representative actions**

One physical or legal person may act on behalf of another person (mandatar), if the person or organization has a legal interest in the outcome of the case. The scope of this legal interest depends of the area of law but in general, there is a tendency to interpret the concept "legal interest" more widely. Representative action is very limited regulated under Danish law but seems to work well. There are no national lists of entities authorised to bring claims but it will typically be an organisation (such as a trade union or a consumer organisation), if the question of the case falls within the purpose of the union.

The consumer ombudsman could also act as a mandatar. The conditions laid down in para. 4 (a)-(c) of the Recommendation would normally apply to but it is not regulated by law. If a representative action is initiated as a way of bypassing the normal procedural rules, including loser pays principle, it will most likely be dismissed.

### **c. Availability of Cross Border collective redress**

Normal rules, which cover international procedural law, are valid. There is no limitation as to the nationality of the group members or group representative. However, the court's decisions in a Opt Out class action only have binding effect on class members who could have been sued in Denmark for the claim in question when the case was first brought (see below under d).

### **d. Opt In/ Opt Out**

Both the Opt In and Opt Out model is available under Danish law. However, only a designated public authority (currently only the consumer ombudsman) may bring an Opt Out class action.

According to Section 254e (5) of the DAJA, a class action includes those, who have joined the group (Opt in), unless the court according to section 254e (8), decides that the class action should include those who have not left the group (Opt Out).

According to Section 254e (8), a designated public authority can request the court that the group action must include the group members who have not opted out of the group action. In addition to the conditions specified above (under Opt In), the Opt Out model is only available, if the group action concerns claims where it is clear that the claims due to their small size cannot generally be expected to be promoted by individual actions and it is assumed that a group action with registration will not be an appropriate way of dealing with the claims. Accordingly, Opt Out is secondary to Opt In.

Currently only the consumer ombudsman has been authorised to act as a group representative in Opt Out class action and only within the following areas of law:

- The Marketing Practices Act (2013-09-25 no. 1216), Section 28 (2)
- The Payment services and electronic money Act (2015-04-24 no. 613), Section 97 (6)
- The Payment accounts Act (2016-04-27 no. 375), Section 15 (2)
- The Act on dealing with claims for breach of competition law (2016-12-13 no. 1541), Section 16
- The Act on Financial Activities (2017-01-31 no. 174), Section 348(1)
- The Investment Association Act and Section (2015-08-25 no. 1051), Section 170
- The Securities Trading Act (2017-03-21 no. 251), Section 3(3).
- The Act on financial advisors and mortgage brokers (2016-07-05 no. 1079), Section 11(5)
- The Act on property credit companies (2016-07-05 no. 1078), Section 12(2)

- The Act on managers of alternative investment funds, etc. (2016-07-06 no. 1074), Section 164

So far the consumer ombudsman has not acted as a group representative neither under the Opt In or the Opt Out model.

Both in relation to Opt In and Opt Out class actions the court sets a deadline for the class members to opt-in or out after having received the writ and appointed the class representative. The court can exceptionally allow a member to join, respectively opt-out of the action, after the deadline has elapsed if there are extenuating circumstances. Such circumstances are determined based upon the strength of the group member's explanation for their request to join or opt-out. The court would weigh this explanation against the harm it may provide to the defendant before ruling on the request. At present, no case law is available on the occurrence of this issue.

If a claimant wishes to leave the group before final judgement, the framework for the class action will probably have to be changed. That is only possible if the Court finds it "necessary". One reason to leave the group, that may satisfy this criterion is, if the claimant wishes to follow the claim himself due to new information.

It is a condition for bringing a class action, that the members of the class can be identified and informed of the case in an appropriate manner. Those persons whose claims fall within the framework of the class action must be informed of the terms and the legal effects of opting in or opting out of the action. This information is provided in a form specified by the court. In determining the form, the court will mostly likely consider (a) the particular circumstances of the mass harm situation, (b) freedom of expression, (c) right to information, (d) right to protection of the reputation, or (e) the company value of a defendant before its responsibility for the alleged violation or harm is established by the final judgment of the court.

The form specified by the court may include that the notification is made in whole or in part via public announcement and the court can require the class representative to carry out the notification. The costs of the notification are paid in the first instance by the class representative.

According to Section 254 f (2) of the DAJA, the court's decision in class actions based on the Opt Out model, only have binding effect on class members who could have been sued in Denmark for the claim in question when the case was first brought. The hypothetical action will typically be a negative action for recognition.

Under the Court homepage it is possible to get information (in Danish) about pending class actions.

#### **e. Main procedural rules**

Collective redress is – as a starting - subject to the general procedural rules of the DAJA concerning civil disputes, including the question of evidence and access to interim measures.

Under collective redress the presentation of *evidence* is – as in civil cases in general - the responsibility of the parties. According to Section 339 (3) of the DAJA, the court may regardless invite one of the parties to resent evidence, if the factual circumstances of the case are uncertain without such evidence.

A party or a third party is furthermore obliged to produce written evidence in his or her possession which may be presumed to have evidentiary value (see

Section 298 and 299 of the DAJA). To obtain a court order, the applicant will have to identify the document with sufficient clarity. The condition is to prevent fishing expeditions.

If the other party does not obey to the order, the court may decide that it will have a negative procedural impact according to section 344(2). If the third party does not obey to the order, the court may, inter alia, issue a fine according to section 178.

The parties are also free to put questions to each other and call in witness under the main hearing.

Access to interim measures is regulated in the fourth division of the DAJA and does also apply in class actions cases according to Section 254 a (2).

Despite the similarities, there are also some differences in the procedural rules governing collective redress regarding class action and joinder of persons:

### **Class action**

The conditions for bringing a class action (Opt In and Opt Out) are specified in the DAJA, chapter 23a.

According to Section 254a (1) common claims submitted on behalf of a number of persons can be considered under a class action. Under Section 254b(1), class actions can brought when (1) there is a common claim as specified in Section 254a, (2) there is a venue for all of the claims in Denmark, (3) the court is the venue for one of the claims, (4) the court possesses the requisite expertise to deal with one of the claims, (5) class actions are judged to be the best manner of handling the claims (class action is secondary), (6) the members of the class can be identified and informed of the case in an appropriate manner, and (7) a class representative as per Section 254c of the DAJA can be appointed (see section b). According to case law, the decisive criteria will often be "similar claims" and "the best manner of handling the claims". It is the court who decides whether the conditions are fulfilled.

A class action brought by a designated public authority under the Opt Out model needs furthermore to demonstrate that the claims due to their small size cannot generally be expected to be promoted by individual actions and it is assumed that a group action with registration will not be an appropriate way of dealing with the claims. Since the consumer ombudsman is the only designated public authority the claims also needs - as a starting point - to be a consumer claim (see section d).

Under Sections 254d and 348 of the DAJA, class actions are brought by submitting a writ to the court. The writ can be submitted by anyone who can be appointed class representative under Section 254c (1) (see section b). Apart from the normal requirements for writs under Section 348, the writ in a class action (both Opt In and Opt Out) must include a description of the group and how to identify and contact the group members. If the conditions are fulfilled the group representative is appointed by the court, and the court sets the framework for the class action. The court may subsequently alter the framework.

After having received the writ and appointed the class representative, the court sets a deadline for the class members to opt-in or out. The court can exceptionally allow a member to join, respectively opt-out of the action, after

the deadline has elapsed if there are extenuating circumstances (see Section 254e (6) (for opt-in) and Section 254e (8) (for opt-out). A court's decisions in a class action have binding effect on the class members covered by the action.

Any settlement entered into by the class representative on claims covered by the class action becomes valid when the settlement is approved by the court under Section 254h of the DAJA. The court will approve the settlement unless the settlement discriminates against some class members or is otherwise patently unfair. Class members must be advised of the court's approval of a settlement

### **Joinder of parties**

According to Section 250 (1) more than one party may sue or be sued in one action where: (i) the Danish courts are the proper forum for all of the claims; (ii) the court is the proper venue for one of the claims; (iii) the court has subject-matter jurisdiction over one of the claims; (iv) all claims may be heard under the same procedural rules; and (v) none of the parties object, or the claims are connected to such an extent that they should be heard in one action notwithstanding any such objections.

## **3. Available Remedies**

The remedies available under collective redress, including Opt In class actions, are the same available under normal the civil procedure e.g. injunction, damages, restitution of profit, interest or getting a court order obliging the defendant to perform an act (e.g. terminate a contract) but not punitive damages or extra-compensatory. The process for temporary injunction relief is regulated in a special chapter of the Danish Administration of Justice Act (chapter 40). If a claim for the alleged infringement has not already been lodged with a Danish or foreign court or initiated by an arbitration tribunal, the person who has requested a temporary injunction shall within 2 weeks after the decision to grant an injunction is final, institute or initiate such a case. Such case may include claim for damages.

The remedies available under the Opt Out model seems limited to damages and interest due to fact that the (public) group representative (the consumer ombudsman) needs to demonstrate that the *claims due to their small size* cannot generally be expected to be promoted by individual actions. However, no case law is available regarding this issue.

It is possible to rely on an (final) injunction in a separate follow-on individual or collective damages action, if the parties are the same in both cases. Areas include where the Consumer Ombudsman has brought a case regarding an injunction (e.g. regarding advertising) but not damages. Consumers may subsequent bring an individual/collective follow-on damages case. The same would be the case, if the injunction is based on public enforcement (e.g. a decision from the Danish Competition authorities) and the decision is final (no access to appeal). This is usually the case in advertising and competition law. In these cases, the claimant needs not to prove the reasons for the injunctions under damages action and according that claimant has already – as a starting point – proved liability. A injunctive order (based on a final decision from a public authority) will – as a general rule - constitute very strong evidence of the infringement within the follow-on damages action. In a competition case it will be binding. Where there is a final decision from a



public authority, the question of liability will therefore seldom be an issue. If the injunction case and the follow-on damages includes different private plaintiff, it is not possible to rely on the injunction (it would not be binding) in separate follow-on damages case. However, it may have precedent.

According to the Danish Administration of Justice Act (chapter 40) it is possible to apply for a temporary injunction. The chapter only deals with temporary injunctions and prohibition and the process is based on a summary proceeding. Accordingly, the process does not include damages. The process can be very fast (within a few days) depending on the subject of the case.

If a claim for the alleged infringement has not already been lodged with a Danish or foreign court or initiated by an arbitration tribunal, the person who has requested a temporary injunction shall within 2 weeks after the decision to grant an injunction is final, institute or initiate such a case. The case may include claim for damages. All civil claims (injunction and damages) are treated according to the same general rules in the Danish Administration of Justice Act (Third book). Accordingly, no diverging provisions depending of area of law.

According to the Danish Limitation Act, the standard limitation period is 3 years from the due date of the claim. The creditor's unawareness of the debt or the debtor may postpone the date at which time begins to run. The 3-year limitation period is supplemented by a 10-year maximum period. As regards claims for compensation for personal injury, environmental damage or damage caused by noise and vibrations, the maximum period is, however, 30 years. Having to wait on a final decision before commencing a collective follow-on claim may have a negative impact of the possibility to make want to opt in, because people simply has moved on in the life. It may also be difficult to collect evidence long time after the infringement.

#### **4. Costs**

Collective redress is - as other type of civil actions under Danish law - governed by the Loser Pay Principle, and the court has a wide discretion as to the award of "reasonable costs". The usual rule is that the loser of the action pays the costs of the winning party. However, this order can be varied where the conduct of the case by the winning party makes it unreasonable for the losing party to pay all or part of the winning party's costs.

##### **a. Class action**

The group representative is - as a starting point - liable for cost. Nevertheless, according to Section 254 f (3), a class member can also be ordered to pay legal costs to the opposite party and/or the class representative, if the court have decided that joining the class is condition upon the member's proving the providing security for legal costs specified by the court unless the member has legal aid insurance or other insurance which covers the costs of the case, or the class action fulfils the terms for free legal aid and the member fulfils the financial conditions in the Act (see Section 254e, (7)).

If security is demanded from each member of the class, this security amount is at the same time the maximum cost that will have to be carried by the class member plus such amounts that are collected to the member through

the case. It is accordingly possible to know what the maximum litigation risk will be before joining the group.

A class member can be ordered to pay legal costs to the opposite party and/or the class representative. The opposite party's claim takes precedence over that of the class representative. The class member cannot be ordered to pay legal costs over and above the amount specified under Section 254e(7) of the Act, i.e. the security provided plus any sum owing to the class member as a result of the case. If the plaintiff loses the case, he or she will have to pay legal cost to the group representative but not the group members

**b. Joinder of parties**

Each individual claimant is responsible for the cost.

**c. Representative actions**

The person representing the claimant is responsible for the cost.

**5. Lawyers' Fees**

Lawyers' fee is under Danish law based on, inter alia, time used, legal nature of the issues, and the result of the case. It is not possible to enter into a contingency fees or risk agreements. The court decides how much the losing party has to pay on lawyer's fee to the winning party. However, in instances where the winning party may have another agreement with his lawyer concerning fee, the winning party's lawyers fee is therefore not always covered. This approach to lawyers' fees does not create an incentive to litigate nor does it lead to abusive litigation/frivolous claims or an increase in unnecessary litigation.

**6. Funding**

Different forms of funding are available under Danish law, including public, private and third party legal funding. A claimant party is not required to declare the origin of any funding to the court at the outset of proceedings. It is possible to apply the Department of Civil Affairs for free process. However, the group members can not apply. Instead, the group representative may apply for free process for the entire group action.

Besides free process granted by the public, private legal aid covered by insurance companies (normally through the family insurance) also applies for class actions.

Third-party funding is not forbidden but does not seem widespread in practice. There is no specific regulation regarding third-party funding. Additionally, lawyers handling cases are forbidden from using their own finances to support their cases.

**7. Enforcement of collective actions/settlements**

According to section 478 (1) of the DAJA enforcement may be made on the basis of, inter alia, a judgement or a settlement concluded before a before the courts. A judgment or a settlement in a class action may therefore be enforced under Danish law. Anyone who deliberately violates a prohibition or

injunction may be sentenced to a fine or imprisonment for up to 4 months, and in connection with this, be ordered to pay compensation. The same applies to the person who deliberately assistance to violate the prohibition or injunction. Furthermore, if a ban or injunction has been issued, the court of law shall, upon request, provide the person who has obtained the ban or injunction (requester), assistance for maintaining the ban or injunction, including by preventing the breach of the ban by ensuring compliance with the injunction or by destroy what has been done in violation of the prohibition or injunction.

A judgment becomes enforceable on expiry of the waiting period unless an appeal has been filed before the expiry of the waiting period. The waiting period is 14 days of the date of the judgment unless otherwise provided in the judgment.

According to section 479 the Minister of Justice may lay down rules to the effect that decisions by foreign courts and public authorities on civil claims and agreements concerning such claims are enforceable in Denmark if they are enforceable in the state in which the decision was made or subject to the laws of which the agreement is to be judged and if such enforcement would not be obviously incompatible with the legal order of Denmark.

Denmark has signed an international agreement with the European Community to apply the provisions of the Brussel I Regulation between the EU and Denmark. The Brussel I Regulation has been implemented into Danish Law by law no. 1563 dated 20. December 2006.

## **8. ADR**

There is a great number of ADR mechanisms available before litigation. These mechanisms seek to settles a high number of small individual claims before they are progressed to the courts. If the defendant firm does not comply with these ADR rulings, the consumer ombudsman may take the question to court on behalf of the consumer or a group of consumers. These court proceedings may be commenced over the same issues whilst ADR proceedings are taking place. The ADR proceeding would normally be stayed during the litigation. There are no collective ADR mechanisms available.

## **9. Number and types of cases brought/pending**

No official information is available regarding number of cases brought. However, since 2008 at least nine class actions have been approved under the Opt In model (see below). As mentioned above, no class actions under the Opt Out model has been brought so far.

Information of pending cases is available on the homepages for the Danish Court System. (<http://www.domstol.dk/selvbetjening/gruppe/Pages/default.aspx>). Four cases are currently pending.

## **10. Impact of the Recommendation/Problems and Critiques, including**

### **Impact of the collective mechanism (or lack of) on behaviour/ policy of stakeholders (direct/ indirect, economic/social impact)**

The Danish class actions scheme was evaluated in 2014 by the Danish Justice Department. The conclusion was that the scheme works as anticipated and that there is no ground for changes. There is no reference to the Recommendations from 2013 in the evaluation.

#### **a. Incompatibilities with the Recommendation's principles**

As mentioned above, third party funding is possible under Danish law. Since it is self-regulated and not (yet) common, it is not clear whether and how the courts ensure compliance with the Recommendation, especially p. 16 and p. 32.

Due to the Danish 10-year maximum limitation period, it may - within some areas (e.g. competition cases) - not always be possible to postpone a class action until after the decision from the public authority has become final. Accordingly, a group representative may have to take the chance and initiate a class action based on a decision from a public authority, which has not become final and therefore may be changed. That may be in conflict with the recommendation, especially p. 34.

#### **b. Problems relating to access of justice/fairness of proceedings including**

Since a class action needs to be approved by the court, it seems to limit the risk for abusive litigation. In particular the condition that the class action is judged to be the best manner of handling the claims seems to establish a wall against groundless actions.

Deciding on procedural issues, including approval of the class action, size of security and identification of the group, may delay the legal process. Therefore, verification of a claim at the earliest opportunity is rarely possible. In the meantime a court ruling in an individual proceeding concerned with the same matter may create ground for a settlement. If the individual case is not handled properly it may become a disadvantage for the class action.

Financing seems also to be difficult, if the class action does not get free process.

So far the consumer ombudsman has not filled any class actions. In 2014 the Justice Department evaluated the class action scheme introduced in 2008 based on input from key stakeholders. According to the consumer ombudsman, the mere possibility to file a class action has improved the ombudsman's chances to reach a settlement, especially within the financial sector.

## II. Sectoral Collective Redress Mechanism(s) (if any)

As specified under Section II the consumer ombudsman may act as group representative in an Opt Out class action within specific (consumer) areas of law.

## III. Information on Collective Redress

A summary of all pending class actions in Denmark can be viewed on the Danish Court Administration's website at [www.domstol.dk](http://www.domstol.dk). The information is only in Danish.

There are no official databases that allow plaintiffs and courts to find out about competing individual actions in other fora.

## IV. Case summaries

As mentioned above, most of the class action cases brought in Denmark have been settled before reaching a final judgement. Accordingly, the case law below is mostly concerned with procedural questions raised during the procedure.

<p><b>Case name:</b> bankTrelleborg</p> <p><b>Reference:</b> U.2012.1228H - The Supreme</p> <p><b>Subject area:</b> Securities</p>	<p><b>Keywords:</b> Class action (Opt In), Securities</p> <p><b>Summary of claims:</b> Before having to file for bankruptcy, bankTrelleborg was taken over by another Danish bank, Sydbank. The former shareholders of bankTrelleborg filed three class actions afterwards regarding: (i) the legality and sale price under the takeover; (ii) errors and omissions in a prospectus made public before the takeover in connection with a public offering; and (iii) errors and omissions in that prospectus in a claim brought by investors who bought shares in the secondary market.</p>
<p><b>Dispute resolution method</b></p> <p>Class action (Court) and settlement</p>	<p><b>Findings:</b> The first case was won by the defendant (Sydbank). The second two were settled. Probably because the Danish Supreme Court in an individual proceeding had found that the prospectus did not give a correct description of the bank's financial situation.</p>
<p><b>Cross-border character/ implications, if any</b></p> <p>Non</p>	

<b>Opt In</b>	<b>Outcomes</b> Settlement: Yes Remedy: Yes Amount of damages awarded: In total approximately 18.153.850 Euros, including legal cost.
<b>Type of funding</b> Free process	
<b>Costs:</b> Loser Pay Principle	
<b>Abusive litigation:</b> No	

<b>Case name:</b> The hedge fund case  <b>Reference:</b> U.2012.1561 V - The High Court of Western Denmark  <b>Subject area:</b> Procedure, investment	<b>Keywords:</b> Group action approved, individual differences, damages  <b>Summary of claims</b> Question of damages. An association consisting of approximately 1,100 investors filed a class action against a hedge fund and a bank, holding them jointly liable for the investors' losses in the hedge fund.  The class action was approved by the court (see U.2012.1561 H) but a settlement was reached before a final judgement on the merits.  <b>Findings:</b> Based on an overall assessment The High Court approved the class action despite individual differences regarding the circumstances under which the investments in the fund had been made.  <b>Outcomes</b> Settlement: Yes Remedy: Yes Amount of damages awarded: In total approximately 18.153.850 Euros, including legal cost
<b>Dispute resolution method</b> Class action (Court) and settlement	
<b>Cross-border character/ implications, if any</b> Non	
<b>Opt In</b>	
<b>Type of funding</b> No information	
<b>Costs:</b> Loser Pay Principle	
<b>Abusive litigation:</b> No	

<b>Case name:</b> Wutzerath Parken	<b>Keywords:</b> Group action approved, size of security
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<p><b>Reference:</b></p> <p>U.2011.1596 V - The High Court of Western Denmark</p> <p>U.2012.2938 H – The Supreme Court of Denmark</p> <p>V.L. B-0049-11- The High Court of Western Denmark</p> <p><b>Subject area:</b> Procedure, Contract law</p>	<p><b>Summary of claims</b> Question of damages. An association of investors filled a class action against providers of a wind a windmill project.</p> <p>Before reaching a final judgement, two procedural questions were addressed. Firstly, whether the case should be accepted as a class action. Secondly, the size of the security for group.</p> <p><b>Findings:</b> The case was accepted as a class action (U.2011.1596). The size of the security for legal cost (in first instance) should only cover costs in connection with the first instance - not also legal cost in case of a possible appeal (U.2012.2938 H).</p> <p>The providers was found not liable to the group (V.L. B-0049-11)</p>
<p><b>Dispute resolution method:</b></p> <p>Class action / Court judgement</p>	<p><b>Outcomes</b></p> <p>Settlement: No</p> <p>Remedy: No</p> <p>Amount of damages awarded: Non</p>
<p><b>Cross-border character/ implications, if any</b></p> <p>One of the providers was a German corporation. No information regarding implications.</p>	
<p><b>Opt In</b></p>	
<p><b>Type of funding</b></p> <p>No information</p>	
<p><b>Costs</b></p> <p>Loser Pay Principle</p>	
<p><b>Abusive litigation</b></p> <p>No</p>	

<p><b>Case name:</b> Roskilde Bank</p> <p><b>Reference:</b> U.2016.104Ø - The High Court of Eastern Denmark</p> <p><b>Subject area:</b> Procedure, Securities</p>	<p><b>Keywords:</b> Private class action, procedural hindrance</p> <p><b>Summary of claims:</b> Question of damages. An association of former employers to a bank under bankruptcy, wanted to file a class action regarding damages because they had brought sheers in the bank.</p> <p><b>Findings:</b> The case was dismissed because the individual claims were not considered "common claims".</p> <p><b>Outcomes</b></p> <p>Settlement: No</p> <p>Remedy: No</p> <p>Amount of damages awarded: Non</p>
<p><b>Dispute resolution method</b></p> <p>Class action / Court</p>	
<p><b>Cross-border character/ implications, if any</b></p> <p>Non</p>	
<p><b>Opt In</b></p>	
<p><b>Type of funding</b></p> <p>No information</p>	
<p><b>Costs</b></p> <p>Loser Pay Principle</p>	
<p><b>Abusive litigation</b></p> <p>No</p>	

<p><b>Case name:</b> Foreningen Garantloekken</p> <p><b>Reference:</b> V.L. B-0465-16 - The High Court of Western Denmark</p> <p><b>Subject area:</b></p>	<p><b>Keywords:</b> Private class action, procedural hindrance</p> <p><b>Summary of claims:</b> Private class action against Finansiel Stabilitet (a state-owned company) filed by an association of guarantors in a savings and loans institution taken over by Finansiel Stabilitet during the financial crisis.</p> <p><b>Findings:</b> The case was dismissed because a class action against Finansiel Stabilitet was not considered the best way to deal with the claims.</p>
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Procedure	<b>Outcomes</b> Settlement: No Remedy: No Amount of damages awarded: Non
<b>Dispute resolution method</b> Class action / Court	
<b>Cross-border character/ implications, if any</b> No	
<b>Opt In</b>	
<b>Type of funding</b> No information	
<b>Costs</b> Loser Pay Principle	
<b>Abusive litigation</b> No	

<b>Case name:</b> Fonden Live	<b>Keywords:</b> Private class action, pension  <b>Summary of claims:</b> Higher payment to pension fund.  <b>Findings:</b> The group (former workers in SAS) lost the case in first instance and the case is now under appeal.  <b>Outcomes:</b> The case is still pending Settlement: Remedy: Amount of damages awarded:
<b>Reference:</b> B-3159-11 - Copenhagen Court	
<b>Subject area:</b> Contract law, City	
<b>Dispute resolution method</b> Class action / Court	
<b>Cross-border character/ implications, if any</b> No	
<b>Opt In</b>	
<b>Type of funding</b> No funding	
<b>Costs:</b> Loser Pay	

Principle	
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<p><b>Case name:</b> Viborg Heating</p> <p><b>Reference:</b> The High Court of Western Denmark</p> <p><b>Subject area:</b> Contract law,</p>	<p><b>Keywords:</b> Private class action, consumer claim</p> <p><b>Summary of claims:</b> Question of damages. An association of consumers against the board of directors of an energy plant following a failed geothermic project. The cost of the loss was covered by raising charges for the consumers.</p> <p><b>Findings:</b> The case is not yet approved as a class action.</p> <p><b>Outcomes:</b> The case is still pending</p> <p>Settlement:</p> <p>Remedy:</p> <p>Amount of damages awarded:</p>
<p><b>Dispute resolution method</b> Class action / Court</p>	
<p><b>Cross-border character/ implications, if any</b> No</p>	
<p><b>Opt In</b></p>	
<p><b>Type of funding</b> Free process</p>	
<p><b>Costs</b></p>	

<p><b>Case name:</b> Foreningen Ring 3</p> <p><b>Reference:</b> BS 1-91/2014 - Odense City Court</p> <p><b>Subject area:</b> Contract law</p>	<p><b>Keywords:</b> Private class action, Contract law</p> <p><b>Summary of claims:</b> Odense Municipality's failure to fulfill the seller's loyal disclosure obligation in connection with the municipality's sale of building sites</p> <p><b>Findings:</b> The case is still pending.</p> <p><b>Outcomes</b></p> <p>Settlement:</p> <p>Remedy:</p> <p>Amount of damages awarded:</p>
<p><b>Dispute resolution method</b> Class action / Court</p>	
<p><b>Cross-border character/ implications, if any</b></p>	

No	
<b>Opt In</b>	
<b>Type of funding</b> No information	
<b>Costs</b>	
<b>Abusive litigation</b>	

<p><b>Case name:</b> Amagerbank</p> <p><b>Reference:</b> B-3287-13 - The High Court of Eastern Denmark</p> <p><b>Subject area:</b> Securities</p>	<p><b>Keywords:</b> Private class action, Damages</p> <p><b>Summary of claims:</b> Question of Finansiell Stabilitet and Finanstilsynet in their proceedings in relation to Amagerbanken are liable for the investors who subscribed to the capital increase in Amagerbanken who afterward was declared bankruptcy.</p> <p><b>Findings:</b> The case is still pending</p>
<p><b>Dispute resolution method</b> Class action / Court</p>	<p><b>Outcomes</b> Settlement: Remedy: Amount of damages awarded:</p>
<p><b>Cross-border character/ implications, if any</b> No</p>	
<b>Opt In</b>	
<b>Type of funding</b> No information	
<b>Costs</b>	
<b>Abusive litigation</b>	

<p><b>Case name:</b> Domstolsstyrelsen</p> <p><b>Reference:</b> B-3159-11 - The High Court of Eastern Denmark</p> <p><b>Subject area:</b> Public liability</p>	<p><b>Keywords:</b> Private class action, Damages, Public liability</p> <p><b>Summary of claims:</b> Question of damages due to the introduction of the digital registration by the Court of Denmark.</p> <p><b>Findings:</b> The case is still pending</p>
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<b>Dispute resolution method</b> Class action / Court	<b>Outcomes</b> Settlement: Remedy: Amount of damages awarded:
<b>Cross-border character/ implications, if any</b> No	
<b>Opt In</b>	
<b>Type of funding</b> Free process	
<b>Costs</b>	

# ESTONIA – FACTSHEET

## **Scope**

Estonian law does not provide for a specific horizontal collective redress mechanism. Traditional mechanisms of multi-party proceedings are available (joinder).

In consumer law, possibility to bring a claim on behalf of consumers against unfair trading conditions (solely injunctive).

## **Problems/Incompatibilities with Recommendation principles**

There is no compensatory collective redress.

## **Standing** (Para. 4-7)

The Estonian Consumer Protection Agency (Tarbijakaitseamet), on behalf of the state, and consumer organisations in their own name can bring a claim to protect the collective rights of consumers by demanding the non-application of unreasonable and harmful standard conditions in accordance with Directive 98/27/EC. The consumers associations must be designated and meet specific requirements.

## **Admissibility** (Para. 8-9)

There are no specific rules on admissibility.

## **Information on Collective Redress** (Para. 10-12, 35-37)

For consumer claims, the Consumer Protection Agency has various means of providing information on general consumer issues including court cases, mainly through its website.

## **Problems/Incompatibilities with Recommendation principles**

There is no national registry.

## **Funding** (Para. 14-16)

In the absence of collective redress mechanisms, there are no special rules on funding.

## **Cross Border Cases** (Para. 17-18)

In the absence of a collective redress mechanism, there are no special rules for cross-border cases.

## **Expedient procedures for injunctive orders** (Para. 19)

There are no special rules.

## **Efficient enforcement of injunctive orders** (Para. 20)

In consumer matters, if the trader does not comply with the injunction issued by the Consumer Protection Board, a penalty payment may be imposed upon him.

## **Opt In/Opt Out** (Para. 21-24)

In the absence of collective redress procedures, this is not applicable.

As seen in its comments to EU consultations, Estonia does not support the opt-out model, as it is not compatible with many fundamental aspects of the Estonian procedural system.

### **Collective ADR and Settlements** (Para. 25-28)

The Consumer Dispute Committee provides for an alternative dispute resolution mechanism for consumer claims.

The Insurance Court of Arbitration provides for an alternative dispute resolution mechanism for insurance claims.

### **Costs** (Para. 13)

In the absence of collective redress mechanisms there are no special rules on costs.

### **Lawyers' Fees** (Para. 29-30)

### **Problems/Incompatibilities with Recommendation principles**

Contingency fees are permitted in Estonia.

### **Prohibition of punitive damages** (Para. 31)

Estonian law does not allow punitive or exemplary damages.

### **Collective Follow- on actions** (Para 33-34)

There are no special procedure for damage claims in competition law and no mechanisms for collective claims or actions by representative bodies or public interest litigation (no collective redress).

### **Interplay between injunctions and compensation across all sectors**

There is no compensatory collective redress mechanism available.

# **ESTONIA – REPORT**

## **I. General Collective Redress Mechanism**

### **1. Scope/ Type**

There is no horizontal collective redress mechanism in the Estonian legal system. However, different forms of collective action are possible. These include some possibilities for claims in the collective interest or in the public interest as well as provisions for class proceedings and for joining cases to facilitate the process.

The possibility to make claims in the public interest or the interest of others is aimed at situations where it is appropriate that a representative of some sort makes the claim, for example for apartment owners whose common interests must be defended by a representative, or for consumers, where a representative body may be best placed to know what could amount to unfair conditions. These are exceptions to the principles of Estonian law providing that parties are in control of their cases, each one in a manner so that they can be individually identified.

Rules on joining cases and collective proceedings aim at expediting and simplifying the judicial process. To a large extent, the courts will decide on such measures.

The Code of Administrative Court Procedure recognises class proceedings if there are more than 50 third parties to a proceeding (Section 22). The provisions still consider individuals as parties to the proceeding, but take into account that a large number of persons involved will entail special requirements regarding the process.

In the Code of Civil Procedure there are no provisions on class proceedings. Section 207 permits participation of several plaintiffs or defendants in certain situations. Section 374 permits joinder of claims if several claims of the same type which involve the same parties, or which are filed by one plaintiff against different defendants or by several plaintiffs against the same defendant are subject to concurrent court proceedings. This is a decision made by the court, if it allows for a more expeditious or facilitated hearing of the matter.

In case of joint actions, each plaintiff or defendant participates independently with regard to the opposite party and unless otherwise prescribed by law, an act of a plaintiff or defendant does not bear legal consequences for a co-plaintiff or co-defendant (Section 207 Code of Civil Procedure). Consequently, even if applicants have made their application jointly but the case is about a monetary claim from each applicant on the respondent, all applicants act independently in the process. This is further confirmed by Section 446 paragraph 1 according to which, in a ruling made in favour of many applicants, the court must note in which part the claims of each individual applicants has been satisfied and how the decision affects each applicant. In case there is a finding in favour of applicants as a group with some form of group compensation, this must be specifically mentioned and be based on specific reasons.

As concerns consumer claims, the Estonian Consumer Protection Agency (Tarbijakaitseamet) may, in their own name and on behalf of the state and consumer organisations, initiate civil procedures for the protection of the collective rights of consumers by demanding the non-application and the abolishment of unreasonable and damaging type rules in accordance with Directive 98/27/EC. The Consumer Protection Agency and consumer organisations have been given the right by law to turn to court to prohibit unfair trade conditions. Until now it has not been possible in Estonia to demand compensation for damages through class action.

There is a dispute resolution mechanism for consumer claims under the auspices of the Consumer Protection Agency, the Consumer Disputes Committee.<sup>250</sup> This is not a collective redress mechanism as it deals with individual issues, but it does meet similar aims to those of the Recommendation as far as providing a means to facilitate solving of consumer disputes through a representative organ. The Committee is competent to resolve domestic and cross-border consumer disputes initiated by the consumer and arising from contractual relations between consumers and businesses, where one party is a business whose place of establishment is in the Republic of Estonia. There are certain types of claims with which the Committee cannot deal as other courts or organs have exclusive jurisdiction over them. These are listed on their website and include complaints related to:

- non-economic services of general interest;
- educational services provided by legal persons governed by public law;
- health services which are provided by health care professionals to patients in order to assess, maintain or restore their state of health, including prescribing, dispensing and supplying medicinal products and medical devices;
- claims arising from death, bodily injuries or health damages;
- resolution procedure by this Act prescribed by other Acts in conformity with the requirements provided in this Act.

It is free of charge to address the Consumer Disputes Committee. In most cases, the outcome will be reached within 90 days from the date the proceeding of the complaint was started.<sup>251</sup> The process aims to provide adequate compensation to consumers but not to adjudicate on damages.

## **2. Procedural Framework**

### **a. Competent Court**

There are no special collective redress mechanisms but in the instances mentioned above administrative or civil courts can in some cases deal with collective cases. The rules for choice of court are the regular rules depending on the type of dispute, the geographical area and subject matter jurisdiction of the respective courts. There are no special courts for collective redress.

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<sup>250</sup> <https://www.tarbijakaitseamet.ee/en/consumer-disputes-committee>

<sup>251</sup> *Ibid.*



The general consumer complaint organisation is the Consumer Disputes Committee, operating under the auspices of the Consumer Protection Agency. This is not a court but a special dispute resolution body that is not compulsory. It is mentioned here as it is an important organ for consumer disputes and its existence together with its functioning and efficiency are relevant in the general debate of whether there are sufficient mechanisms to protect the rights of individuals in the kind of situations that may affect a large number of (otherwise not connected) individuals.

The procedural framework for the Consumer Dispute Committee is the following:

- The Committee normally consists of a three-member commission, if needed it can have five members. The composition is: Chairman, consumer representative, business representative.
- The Chairman is appointed for a period of five years by the Minister of Economy and Communication in consultation with the Ministry of Justice. The Members are appointed for four years by the General Director of the Consumer Protection Agency on suggestions by trade associations or professional bodies.
- The process should start with a complaint directly to the business concerned, followed by the possibility to complain to the Committee and if no resolution is achieved, a claim can be made to the district court. The consumer at all times retains the right to turn to court if they are not satisfied with the outcome of the dispute resolution process.
- The Committee provides explanations on the ways to make (oral or written) complaints and requires the business concerned to reply within 15 days, giving its view on the claim and suggestion for remedies. If there is no reply within the required period and no demand of prolongation, it is assumed that the business did not accept the claim and a complaint can be made to Committee (Consumer Protection Act Section 40).
- The Committee can adjudicate in Estonian as well as cross-border disputes, provided that the business is located in Estonia. It deals with claims based on a contractual relationship between the parties, with certain exceptions like non-contractual damage e.g. traffic damage, or any issues that have led to death, illness or bodily injury. Some categories of services like public education and health care services are excluded, as are labour disputes.
- The Committee will not deal with a complaint if the same dispute is subject to court process or another similar process. It may also decide not to deal with complaints about demands of less than 30 Euro or complaints that appear to be unlikely to have any success.
- The Committee can include experts and hear evidence, but any costs for expertise is to be borne by the parties. The Committee will normally decide within 90 days.
- Complaints can be made in free form or by using a form available on-line. All relevant information must be added to the complaint (agreements, proof of payment, correspondence, etc.). Complaints are first reviewed by the secretariat. The procedure in the Committee can be oral or in writing.

- Decisions can be to require the business to fully or partially meet the demands of the consumer or the Committee can decide to reject the claim.
- Decisions are sent to the parties and published on the web-page of Committee.
- The business shall meet the demands within 30 days of the publication of the decision on the web-page. If this is not done, the claimant can turn to the district court, and the Committee will publish the information on its web-page that the business has not met with its requirements, creating a "black list".<sup>252</sup>

## **b. Standing**

As the administrative court procedure is the only explicit class procedure, its rules on standing are the only specific rules that detail standing. In most situations, the initial question of standing is decided according to the general rules applicable to the type of case presented. In the additional step of deciding on some form of collective (joined) proceeding, there are no specific provisions on standing as this will be an add-on to a case in front of the court rather than a separate process.

According to Section 22 of the Code of Administrative Court Procedure, in cases with more than 50 third parties with an interest in the matter, there can be a class proceeding. According to subsection 2 of Section 22, "the court will join to the class proceedings, in accordance with the general procedure for such proceedings, any persons whose rights are affected in the matter to a significantly higher degree than those of others, in particular the addressees of the contested administrative act, and any persons who have taken an active part in the administrative proceedings which gave rise to the dispute."

Subsection 3 of Section 22 states that: "In the case that the notice specified in subsection 2 of section 23 of this Code has been duly published, the person who did not, within the established time-limit, seek to join the proceedings, may, if that person appeals the ruling made in the class proceedings, only rely on not being joined to the proceedings if the court contravened subsection 2 of this section and the person did not learn of the class proceedings in good time."

In addition, it may be mentioned that the existing possibilities for bringing cases on consumer disputes for the collective or public interest show a form of representative action, which is similar to that mentioned in the Recommendation, as it consists of a designated entity that is capable of representing the interests of the claimants in an appropriate manner.<sup>253</sup>

## **c. Availability of Cross Border collective redress**

In the absence of a collective redress mechanism, there are consequently no special cross-border mechanisms. For consumer dispute resolution, Estonia

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<sup>252</sup> *Ibid.*

<sup>253</sup> Recommendation (11 June 2013) on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU), preamble point 18, Recommendation point 3(d) and 4.

implements EU law on cross-border cooperation.<sup>254</sup> The new Consumer Protection Act implements or takes into consideration a number of EU legal acts on this issue.<sup>255</sup>

The mentioned possibilities for some forms of collective action could also include cross-border situations if they otherwise fit with the provisions in the respective laws.

#### **d. Opt In/ Opt Out**

In the absence of collective redress procedures, this is not per se applicable.

In its comments to EU consultations, Estonia expressed its reluctance toward the opt-out model, as this would require changes to many fundamental aspects of the Estonian procedural system. The Estonian government has stated that the opt-out model would not be compatible with the Code of Civil Procedure, which presupposes that parties bring a case individually, apart from the limited possibilities - if the law specifically so provides - to bring cases to protect the interests of others or the general public.

The Estonian legal procedural system is based on the principle of a dispositive process: parties can decide to start a legal process or not. This would be hard to reconcile with an opt-out model. The obligation to inform parties, to allow each party to be heard and to determine what evidence to present are other procedural requirements that do not fit with an opt-out model.

Opt-in would not appear to be in contradiction with Estonian law in principle as it, according to the Recommendation, requires express consent of the parties<sup>256</sup>, but would need support in law. The existing provisions in the Code of Administrative Court Procedure show a similarity with the opt-in idea. For a full application of collective redress with opt-in, various principles of the right of each party to be informed and heard and so on, would need adjustment.

#### **e. Main procedural rules**

The most significant (if not exactly collective redress) provision is Section 22 of the Code on Administrative Court Procedure: if there is more than 50 third parties in an administrative matter, the court may conduct the matter as class proceedings. In this case, only those who seek a joinder within the established time-limit are joined to the proceedings. The corresponding application may be filed within 30 days as of the publication of the relevant notice in accordance with Section 23 of the Code.

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<sup>254</sup> Regulation 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation). See also [http://ec.europa.eu/consumers/redress\\_cons/index\\_en.htm](http://ec.europa.eu/consumers/redress_cons/index_en.htm)

<sup>255</sup> Mentioned are: Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR); Directive 2009/22/EC on injunctions for the protection of consumers' interests; Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC and Regulation (EC) No 2006/2004 (Unfair Commercial Practices Directive); Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers; Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features.

<sup>256</sup> Recommendation 2013/396/EU point 21.

Not applying for a joinder to the proceedings does not prejudice a person's right to bring an action against the administrative act or measure contested in the class proceedings (Subsection 4 of Section 22).

### **3. Available Remedies**

There is no mechanism for collective decisions on damages. In any joined case, damages will be allocated individually between claimants.

In claims brought by the Consumer Protection Agency against the use of unfair trading conditions, there are no damages applicable. The Supreme Court has stated that damages should be linked to specific interest and general economic interests are normally not compensated.<sup>257</sup>

The Consumer Protection Board and the State Agency of Medicines have direct injunction powers. Their decisions can be appealed in court. If the trader does not comply with the injunction, a penalty payment may be imposed upon him.

The Estonian government in its comments to the EU consultation did not support the idea of giving consumer organisations the right to demand compensation from businesses for damages caused to consumers.<sup>258</sup>

The Recommendation contains a clear prohibition of punitive damages that lead to overcompensation and are alien to European legal systems, where punishment is a competence of public authorities. This fits with the Estonian attitude.

### **4. Costs**

In the absence of collective redress mechanisms there are no special rules on costs.

### **5. Lawyers' Fees**

In the absence of collective redress mechanisms there are no special rules on lawyers' fees.

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<sup>257</sup> Cases 3-2-1-64-05, 13 June 2005, and 3-2-1-123-05 of the Civil Law Chamber of the Supreme Court.

<sup>258</sup> *Eesti seisukohad Euroopa Komisjoni poolt esitatud Rohelise raamatu küsimustiku „Kollektiivse hüvitamise mehhanismid tarbija jaoks“ eelnõule* (Riigikantselei/State Chancellery letter to Riigikogu juhatus/Parliament management, 26.02.2009 nr 1-4/09-01246-3)

## **6. Funding**

In the absence of collective redress mechanisms there are no special sources of funding. There is no funding available for litigation for private enforcement of competition law.

## **7. Enforcement of collective actions/settlements**

In the absence of collective redress mechanism there are no special rules on enforcement.

As for consumer complaints to the Consumer Dispute Committee, it does not have any special tools for enforcement apart from listing businesses on its home page on a "black list". Its decisions are not legally enforceable.

## **8. Number and types of cases brought/pending**

There are no cases on collective redress as such and there have not been many notable cases using the possibilities that exist for collective proceedings. Below some cases are mentioned on related matters of interest. Many cases with a collective element lack any particular legally interesting features as the linking is purely a practical matter and for most purposes the parties are seen as separate as far as the substance is concerned (amount of any compensation for example). The authorities (notably consumer authorities) have not brought many cases and it appears as if other ways of influencing unfair trading conditions or other undesirable practices are found, rather than adjudication.

## **9. Impact of the Recommendation/Problems and Critiques, including**

### **a. Consequences where no collective redress mechanism is available**

In Estonia, the Code of Civil Procedure presupposes that most cases are brought by individuals regarding their own rights. However, as mentioned, there is a possibility (Section 3 and Section 198) that cases are brought for the interests of others or the general public, if this is provided by law. Thus, it would be possible without having to change the basic principles of civil procedure to add more possibilities to bring cases for example for collective redress. This must be done explicitly in law. The Code of Administrative Court Procedure contains collective proceedings as well as some other tools for proceedings with many parties.

It would appear that it would be possible to increase the possibilities for collective action, even if full class action type proceedings would be difficult to reconcile with basic procedural principles. The absence of collective redress mechanisms does not appear to have had any significant consequences for

Estonia, as other means exist for bringing the kind of claims that in some countries may be subject to collective redress claims. However, the issue is not much discussed in Estonia neither in the academic, nor the political debate.

**b. Impact of the collective mechanism (or lack of) on behaviour/ policy of stakeholders (direct/ indirect, economic/social impact)**

Estonia is part of the continental legal tradition in which the institute of class actions is not a traditional component. It is consequently not something that lawyers or individuals in Estonia would expect and there has not been any signs of any active demands of such actions. The absence of collective redress mechanisms in Estonia has not been the subject of any debate among the general public and not to any major extent among the legal community. In the public consultation on collective redress initiated by the European Commission in 2011 the number of viewpoints presented from the Estonian side were limited. The Consumer Protection Authority and the Estonian section of the European Consumer Centre were the only bodies that submitted comments.

In general, mechanisms like class actions are perceived as not compatible with the traditions and structure of the Estonian legal system and they are also not common in countries whose legal systems have influenced the Estonian one.

In Estonia, it is possible to protect the collective rights of consumers, regardless of the rights of individual consumers, through the competence given to the Consumer Protection Agency and such rules are directly applicable also in cross-border cases. The Consumer Protection Agency can make administrative demands to businesses to end practices that damage collective interests and to refrain from further similar actions.

Consumer protection issues are subject to relatively high public interest in Estonia with for example a regular feature on consumer issues in one of the main newspapers<sup>259</sup> (with a possibility to ask questions to experts) as well as several web-sites dealing with consumer issues. The Consumer Protection Agency undertakes proactive measures to spread information and supports consumers through the Consumer Dispute Committee, that is active and decides around 500 cases per year.<sup>260</sup>

In its replies to the EU Green Paper, the Estonian government expressed support for class action at an EU level for consumer disputes with a cross-border relevance. At the same time, the view was expressed that many recent consumer protection instruments were not yet fully in force so the need for additional, specific instruments could not yet be known and existing ones should be used properly before additional ones are created. Among existing instruments mentioned were Directive 2008/52/EC and Regulation 861/2007. The Estonian government expressed scepticism regarding new instruments with an important impact on member state domestic legal systems and pointed to the competence of the EU.

**c. Incompatibilities with the Recommendation's principles**

The fears that have been expressed in Estonia are those of many European countries, namely that the implementation of a collective redress mechanism

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<sup>259</sup> [www.tarbija24.postimees.ee](http://www.tarbija24.postimees.ee)

<sup>260</sup> <https://takis.tarbijakaitseamet.ee/avalik/otsused>

could lead to abusive litigation. Furthermore the procedural legislation is not designed to include more than one or a few parties. In a case on collective redress not only the rights of the parties (which is what the legal and procedural system is designed to protect) but also the rights of others or of the general public should be protected. How this is to be done is different than the protection of the actual rights of the party.<sup>261</sup>

The way the idea of collective redress is designed in Estonia (and in many other states with a continental legal system) is that some organs are in charge of protecting the interests of a group such as consumers or of the general public as such. It may mean that the parties to the case are not those whose rights are actually concerned by the case, which clearly is something different than regular civil cases. This raises issues of representation. It is important that collective redress does not limit rights of individuals who must retain their right to bring cases. Collective organisations and/or procedures cannot limit the rights of individuals, as protected by the constitution.

Even if collective redress does not exist as such, the forms of action in favour of the interest of consumers fit with the general aim of the Recommendation, which recommends that action could be brought by representative entities, certified in advance, which meet certain requirements. In Estonia, the conflict resolution system for consumers appear to have similar aims, even if it is not a collective redress mechanism. The action is brought by a suitable body, designated to meet certain requirements.

#### **d. Problems relating to access of justice/fairness of proceedings including**

There are different ways to deal with consumer complaints, in the Consumer Dispute Committee or in court. The possible insufficiency of these mechanisms would be the same in Estonia as in other countries, if a situation led to many small claims that individually would be too small to merit action but where the number of them would lead to a different picture. So far, this has not been seen to be an issue, as the out-of-court mechanisms as well as the small claims procedure provide tools also for smaller claims.

The transparency of cases for competition law (Competition Authority) as well as for consumer cases (Consumer Protection Agency) is good, the cases are published at the websites of the authorities. Court cases are also published (electronically).

## **II. Sectoral Collective Redress Mechanism(s)**

Estonia does not have any collective redress mechanisms as such. Under this section some sectoral dispute resolution mechanisms of related interest will be mentioned.

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<file:///C:/Users/189001/Documents/kollektiivne%20hyvitamine%20VV%20seisukoht.pdf>

## **1. The Insurance Mediator (IM) or the Insurance Court of Arbitration**

This is a system for insurance claims like traffic insurance related claims<sup>262</sup> which, contrary to the Consumer Dispute Committee, is mandatory for the Insurer. The details of the body including its members and its rules of procedure are available on-line and linked via different bodies that fall under it.<sup>263</sup> This is not a collective redress mechanism but an alternative dispute mechanism. It is mentioned here for the same reasons as the Consumer Dispute Committee above: the existence of such mechanisms meets at least partially the same interest as the principles stated in the Recommendation for collective redress. If such bodies function and are transparent, this affects any popular demand for other forms of action.

## **2. Competition Law**

Although private enforcement of competition law is not excluded in Estonian, it is not practiced. There are no special procedure for damage claims in competition law and no mechanisms for collective claims or actions by representative bodies or public interest litigation (no collective redress). Damage claims due to infringements of competition law must be made in civil proceedings or as a civil claim within the framework of criminal proceedings on a competition law crime.

Competition cases can in principle be brought by the Competition Authority or by private parties, under civil or criminal law (Penal Code Article 400). There have been no cases of private enforcement of competition law.

## **3. Environmental law**

No specific collective redress mechanism exists for environmental law. There is a possibility for organisations that protect environmental interests to be parties in a claim and through their organisation to represent collective interest, but the legal process will be a traditional one with the organisation acting in its name.<sup>264</sup> There has been a development in Estonia toward allowing organisations that represent certain interests to have standing in environmental cases, whereas earlier (1990s to very early 2000s) courts were restrictive regarding claims brought to protect public interest as opposed to private narrowly defined interests. The Supreme Court has recognised that in environmental matters it may not be possible to show violation of a subjective right but nevertheless an act being challenged may affect the interest of the claimant (that can be an organisation protecting such interests). It is however not possible to file complaints in the public interest, as the court expressly points to the need for significant and real contiguity to interests of the claimant.<sup>265</sup> Between 2012 and 2014 there was a provisions in the Code of Administrative Court Procedure that specifically mentioned the right of environmental organisations to be claimants in cases of an environmental

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<sup>262</sup> [www.lkf.ee](http://www.lkf.ee)

<sup>263</sup> [https://lkf.ee/et/?option=com\\_content&view=article&id=305&Itemid=269](https://lkf.ee/et/?option=com_content&view=article&id=305&Itemid=269)

<sup>264</sup> The Estonian Environmental Law Centre offers legal assistance specifically for environmental law issues <http://www.k6k.ee/meie-teenused/oigusteenus/>

<sup>265</sup> Case 3-3-1-86-06 of 28 February 2007 Supreme Court Administrative Law Chamber



nature, but that provision was rescinded following changes to environmental legislation.

### **III. Information on Collective Redress**

#### **1. National Registry**

There is no national registry on collective redress cases.

#### **2. Channels for dissemination of information on collective claims**

Section 23 of the Code of Administrative Court Procedure provides for a system for notification of class proceedings, setting out that "the court must choose as effective a means as possible of notifying the persons concerned of the administrative matter to be dealt with in class proceedings, and of the time-limit of making an application for joinder to the proceedings and the relevant procedure. Where this is possible, the court transmits the notice personally to those persons whom the matter concerns in whose respect it may be assumed that they would make arrangements for other persons concerned to be represented in the matter, or to notify such other persons of the matter. Where this is not unreasonably onerous, the court sends a written notice to the address of as many of the persons concerned as possible, or displays such notice in the vicinity of their residence or at other locations which the persons concerned frequently visit."

Subsection 2 of Section 23 contains additional rules on publication of a notice "on at least two occasions staggered by at least one week in a newspaper of national circulation and on at least two occasions staggered by at least one week in through the national broadcasting organisation. A note regarding the way and the place of publication is to be made in the case file."

For consumer complaints disputes, there is information made available on the web-site of the Consumer Protection Agency, where there is a list of companies that have not met with the demands of the consumer complaints commission. The decisions can be accessed by clicking on the name of the respective enterprise in the list, organised per dates of decisions.

The Consumer Protection Agency has various means of providing information on general consumer issues including court cases that it may have been involved in for the public interest, primarily through its website.

### **IV. Case summaries**

As special collective redress mechanisms are not implemented in Estonia, there are no relevant cases to report. There has been one significant case recently brought as a collective case (Telia), which however did not go to the Supreme Court. In addition, some cases are listed that in different ways illustrate the approach of Estonian courts in related matters, including a possibility for the Consumer Protection Agency to act in the collective interest as well as the possibility to link cases, in a limited manner.

<p><b>Case name</b></p> <p>Shareholders v. Telia-Sonera (Telia Company)</p> <p><b>Reference</b></p> <p>Tallinn District Court 2-10-2551, 21 July 2016</p> <p><b>Subject area</b></p> <p>Shareholders</p>	<p><b>Keywords</b></p> <p>Collective case, small shareholders, share price</p> <p><b>Summary of claims</b></p> <p>1563 small shareholders of Eesti Telekom, sold to Telia-Sonera jointly sued as they regarded the obtained share price as too low.</p> <p><b>Findings</b></p> <p>The Court accepted to hear to claim as a collective claim and it ruled in favour of the claimants although for a lower amount than what they demanded, as it was shown the price was lower than a reasonable market price at the time.</p>
<p><b>Dispute resolution method</b></p> <p>Joined claimants</p> <p><b>Court or tribunal</b></p> <p>Tallinn District Court</p>	<p><b>Outcomes</b></p> <p>Compensation for a total of € 951 835 was decided, to be distributed between the claimants.</p> <p>The case showed the possibility to bring a collective claim on behalf of multiple claimants (small shareholders). This was one of the few cases in Estonia where small shareholders presented a united case.</p>
<p><b>Cross-border character/ implications, if any</b></p> <p>Foreign-owned company</p>	
<p><b>Opt-in/out</b></p> <p>n/a</p>	
<p><b>Type of funding</b></p> <p>None</p>	
<p><b>Costs</b></p> <p>Decided by court, loser pays</p>	

<b>Abusive litigation</b>	
No	

<p><b>Case name</b></p> <p>Claim by J. Okk of unconstitutionality of Article 218 paragraph 3 Code on Civil Procedure</p> <p><b>Reference</b></p> <p>17 September 2008 (3-4-1-13-08)</p> <p><b>Subject area</b></p> <p>Constitutional</p>	<p><b>Keywords</b></p> <p>Constitutionality, code on civil procedure, showing limitations to bringing claims in the public interest</p> <p><b>Summary of claims</b></p> <p>Mr J. Okk claimed that the provision requiring representation by a lawyer (member of the bar) is unconstitutional.</p> <p><b>Findings</b></p> <p>The claim was not considered on its merits as the court pointed out that the Estonian legal system normally does not recognise complaints on behalf of others or a collective, unless this is explicitly set out in law. Also constitutional complaints normally require violation of rights of the complainant. This was not shown in the case.</p> <p><b>Outcomes</b></p> <p>Claim dismissed without consideration.</p>
<p><b>Dispute resolution method</b></p> <p>Constitutional claim, written procedure</p> <p><b>Court or tribunal</b></p> <p>Supreme Court Constitutional Chamber</p>	
<p><b>Cross-border character/ implications, if any</b></p>	
<p><b>Opt-in/out</b></p> <p>n/a</p>	
<p><b>Type of funding</b></p> <p>n/a</p>	
<p><b>Costs</b></p>	

n/a	
<b>Abusive litigation</b> No	

<p><b>Case name</b></p> <p>Kogermaa et. al v. Novatours AS</p> <p><b>Reference</b></p> <p>21 October 2016 (3-2-1-75-16)</p> <p><b>Subject area</b></p> <p>Consumer Travel agency</p>	<p><b>Keywords</b></p> <p>Appeal, claims against travel agency, different claimants, joined cases</p> <p><b>Summary of claims</b></p> <p>The appeal was brought in a case in which several applicants made claims at the same time against a travel agency. The claims were dealt with jointly but each claimant shown separately.</p> <p><b>Findings</b></p>
<p><b>Dispute resolution method</b></p> <p>Appeal, civil case</p> <p><b>Court or tribunal</b></p> <p>Supreme Court Civil Chamber</p>	<p>The case shows the possibility to join claims from different applicants against the same respondent, but each claim has to be kept separate and the outcome is individual for each claimant.</p> <p><b>Outcomes</b></p>
<p><b>Cross-border character/ implications, if any</b></p> <p>Firm may be active in different countries</p>	<p>What is relevant in this context is only the style of the case, with a common description of the situation (compensation for change in travel package) and common motivation, but each claim was treated separately, with individual compensation.</p>
<p><b>Opt-in/out</b></p> <p>n/a</p>	
<p><b>Type of funding</b></p> <p>n/a</p>	
<p><b>Costs</b></p> <p>Parties</p>	

<b>Abusive litigation</b>	
No	

<p><b>Case name</b></p> <p>The Republic of Estonia through the Consumer Protection Agency v. Elisa Eesti AS</p> <p><b>Reference</b></p> <p>24 November 2015 (3-2-1-135-15)</p> <p><b>Subject area</b></p> <p>Consumer Telecommunications</p>	<p><b>Keywords</b></p> <p>Consumer protection agency, banning of unfair trading conditions, telecommunications</p> <p><b>Summary of claims</b></p> <p>The Consumer Protection Agency brought an appeal in a case related to a ban on unreasonable trading conditions, namely charging for sending bills to consumers.</p> <p><b>Findings</b></p>
<p><b>Dispute resolution method</b></p> <p>Appeal, civil case</p> <p><b>Court or tribunal</b></p> <p>Supreme Court Civil Chamber</p>	<p>The case was sent back to the district court mainly on formal grounds. The court did state that the Consumer Protection Agency can represent the collective interest against unfair trading conditions and referred to ECJ Case C-372/99 of 24 January 2002 Commission v. Italy (para 15): such claims can be brought even if the conditions under consideration have not been applied to concrete cases.</p>
<p><b>Cross-border character/ implications, if any</b></p> <p>International firm, active in different countries.</p>	<p><b>Outcomes</b></p> <p>Case sent back to District Court as certain facts were not properly taken into account, with a statement that extra charges for bills are normally not fair conditions in the manner used in this case.</p>
<p><b>Opt-in/out</b></p> <p>n/a</p>	
<p><b>Type of funding</b></p> <p>n/a</p>	
<p><b>Costs</b></p> <p>Parties</p>	

<b>Abusive litigation</b>	
No	

<p><b>Case name</b></p> <p>Maidla Vallavalitsus v. Ministry of Environment</p> <p><b>Reference</b></p> <p>28 February 2007 (3-3-1-86-06)</p> <p><b>Subject area</b></p> <p>Environment</p>	<p><b>Keywords</b></p> <p>Environmental law, organisation representing interests</p> <p><b>Summary of claims</b></p> <p>Maidla Vallavalitsus (local authority) complained about mining permits issued to several companies.</p> <p><b>Findings</b></p> <p>Violation of a subjective right may or may not appear in environmental matters but there has to be a link to the party's interests. Environmental law cases are of a special nature.</p>
<p><b>Dispute resolution method</b></p> <p>Regular administrative case</p> <p><b>Court or tribunal</b></p> <p>Supreme Administrative Chamber      Court Law</p>	<p><b>Outcomes</b></p> <p>Organisation was able to represent interests provided there was a clear link to its interests but even without a violation of a subjective right. The lower court decision was upheld but with different motivation.</p>
<p><b>Cross-border character/ implications, if any</b></p> <p>n/a</p>	
<p><b>Opt-in/out</b></p> <p>n/a</p>	
<p><b>Type of funding</b></p> <p>None</p>	

<b>Costs</b>	
Parties	
<b>Abusive litigation</b>	
No	

# FINLAND – FACTSHEET

## Scope

Finnish law does not provide for a specific horizontal collective redress mechanism.

Collective redress mechanisms are available exclusively in the consumer sector (injunctive and compensatory), except in the context of certain financial services within the consumer sector.

In the consumer sector, it is also possible to direct a “group complaint” at the Consumer Disputes Board, which is a neutral and independent expert body. Its decisions are only recommendations.

## **Problems/Incompatibilities with Recommendation principles**

Limited development of collective redress mechanisms.

## Standing (Para. 4-7)

The Consumer Ombudsman (kuluttaja-asiamies) is the designated entity to act as a representative and initiate class actions in the consumer sector.

## **Problems/Incompatibilities with Recommendation principles**

The competence to file a class action claim is exclusive to the Consumer Ombudsman. No ad hoc licenses are available for other entities under current law.

## Admissibility (Para. 8-9)

When the claim is processed, the competent court evaluates the following requirements:

- Multiple individuals have similar claims (same or similar legal facts) against a common defendant
- The use of class action is appropriate in consideration of the size of the party and the nature of the claims
- The claimant party can be specified on a reasonable level

If the court determines that the case may be processed as a class action, the Consumer Ombudsman is notified. He will then assemble the class and present their claims to the court.

## Information on Collective Redress (Para. 10-12, 35-37)

Unless the claim is dismissed, the court must notify each member of the party of the start of the class action process. This should be done by mail or email. If this not possible, the notification on the class action may be posted in one or more newspapers or other suitable media.

## **Problems/Incompatibilities with Recommendation principles**

As no class actions have been initiated at the time of this report (June 2017), there is no national registry for collective redress actions. However, it is likely that any information on collective redress actions would be published through Finlex, an online database of up-to-date legislative and other judicial information of Finland, owned by Finland’s Ministry of Justice.



### **Funding** (Para. 14-16)

The Class Action Act does not provide any specific restrictions to the funding of class actions, or provisions on conditions or control of third party funding.

### **Problems/Incompatibilities with Recommendation principles**

No prohibition or regulation of third party funding. However, as the Consumer Ombudsman acts as a plaintiff in all class action, this has not been seen as a major problem.

### **Cross Border Cases** (Para. 17-18)

There are no specific rules or limitations regarding the involvement of foreign claimants or foreign representative entities.

### **Expedient procedures for injunctive orders** (Para. 19)

The court can order the immediate cessation of a violation through interim measures.

### **Efficient enforcement of injunctive orders** (Para. 20)

General procedures for enforcement apply. Fines are applicable in case of non-compliance.

### **Opt In/Opt Out** (Para. 21-24)

Opt-in system

Any member of the claimant class may leave the class at any time before the final proceeding. After this, leaving the class is only allowed with the defendant's permission.

### **Collective ADR and Settlements** (Para. 25-28)

The Class Action Act does not contain any specific provisions on court directed settlement during the class action procedure. As the general provisions on civil procedure apply to class actions, general preconditions for settlement are evaluated at the start of the process, and as a plaintiff, the Consumer Ombudsman may accept or negotiate a settlement on behalf of the claimant party at any time. The settlement shall then be affirmed by the ruling court.

In case of out of court settlements, judicial control is done by the Consumer Ombudsman

### **Problems/Incompatibilities with Recommendation principles**

Lack of specific provisions on collective alternative dispute resolution and settlements.

### **Costs** (Para. 13)

In general, the losing party is accountable for all the necessary and reasonable legal costs.

In class actions, the legal costs are distributed between the Consumer Ombudsman and the defendant as determined by the Judicial Procedure Act.

### **Lawyers' Fees** (Para. 29-30)

Contingency fees are permitted in Finland. They are however not common, and the final fee must be "reasonable".

### **Prohibition of punitive damages** (Para. 31)

Punitive damages are not available under Finnish law.

**Collective Follow- on actions** (Para 33-34)

In competition law, individual damages actions can be brought as follow-on actions based on the finding of an infringement. The law does not provide the same for collective actions.

**Interplay between injunctions and compensation across all sectors**

It is possible in theory to seek an injunction and compensation within one single action.

# FINLAND – REPORT

## I. General Collective Redress Mechanism

Finnish legislation does not contain any specific provisions for a horizontal collective redress mechanism, only generic provisions on joinder of claims. These are provided in the Code of Judicial Procedure<sup>266</sup>, the primary law regarding judicial procedure in general courts. The general provisions regarding joinder of claims in the civil process, known as joinder (or cumulation of claims), form Ch. 18 of the Code of Judicial Procedure. Subjective joinder means that lawsuits initiated by a single defendant against multiple defendants, or lawsuits initiated by multiple plaintiffs against a single defendant, can be processed collectively.

The requirement is that the lawsuits are based on an essentially the same legal facts (CJP 18:2). For example, joinder of claims could be applied in a case of damages, where the claims are made by multiple plaintiffs, based on a common damage incident, against a single defendant. The application of subjective joinder, while a horizontal redress mechanism, is somewhat more limited when compared to class action lawsuit, in the sense that a subjective joinder requires that the claims are based on the exactly same legal facts, whereas class action lawsuit only requires the legal facts to be similar (CAA section 2). On the other hand, general cumulation of claims is not limited to consumer claims. There are no limitations on plaintiff's representation. Both injunctive and compensatory relief is available depending on the cause of action.

### 1. Procedural Framework

#### a. Competent Court

Any district court in Finland can hear a claim for damages or injunctive relief based on a civil cause of action. Separate actions brought by a plaintiff against the same respondent may be considered by the District Court where the respondent is obliged under law to respond to one of them, if the actions have been brought at the same time and they are based on essentially the same grounds (CJP 10:10). The prerequisites for the hearing of actions in the same proceedings are that the actions have been brought in the same court, that the court is competent to consider the actions to be joined and that the actions may be considered according to the same procedure (CJP 18:7(1)).

#### b. Standing

Each claimant must meet the general standing requirements, as well as the specific prerequisites for joinder of claims. Each party is responsible for its own case. This was one of the main reasons Parliament rejected developing the rules on joinder of claims to comply with the Commission Recommendation.<sup>267</sup>

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<sup>266</sup> Oikeudenkäymiskaari 1.1.1734/4

<sup>267</sup> HE 154/2006 p. 14.

Relating to the cases discussed below, the Tobacco –cases could be considered private actions on behalf of one or a few individuals. The Nokia Tyres- case could be considered a public action inviting anyone with a grievance against the named defendant to sign up for the mass action.

**c. Availability of Cross Border collective redress**

Subject to general forum rules.

**d. Opt In/ Opt Out**

Each party is responsible for its own case. Prior cases of others do not moot later actions as long as the claim is brought within the applicable statute of limitations. The general statute of limitations for claims is three years from the event that gives rise to the injury. In any event the claim must be brought within 10 years of the initial transaction.<sup>268</sup>

**2. Main procedural rules**

**a. Admissibility and certification criteria**

There are no special rules for admitting a cumulated claim other than those for any civil cause of action under the law. A claim may not be added to a cumulated proceeding after the pre-trial hearing without the consent of the defendant(s).

**b. Single or Multi-stage process**

The general rules of procedure call for written preparation and oral pre-trial preparatory hearing, during which the parties are strongly encouraged to reach settlement. If a settlement is reached it can be affirmed by the court. If the parties do not reach settlement, the case will go to trial and the court, after hearing the parties, witness-testimony and reviewing evidence, will give its final verdict. Damages are limited to actual damages. The loser-pays rule applies, which includes reasonable lawyer fees. Considering the increased workload of cumulated claims, the fees will likely be very high and not likely to be adjusted.

**c. Case-management and deadlines**

Strict time limits apply for all stages of summons, preparation, pre-trial hearing, trial and verdict (7 days - 1 month). However, the parties have discretion in civil cases. Settlement negotiations give legitimate cause for extension. The same is true for complex cases. The court may decide to split cumulated claims into separate proceedings, if it is warranted and feasible.

**d. Expediency (particularly in injunctive cases)**

A cumulated claim is not likely to proceed quickly through general civil procedure, partly due to the parties' discretion to request the court for extensions due to exigent circumstances, such as preparing the case, negotiations for settlement, review of evidence.

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<sup>268</sup> Laki velan vanhentumisesta 15.8.2003/728 (Sections 4 and 7).

**e. Evidence/discovery rules**

General rules of procedure apply. Finnish law does not recognize specific procedures for discovery. Parties will state the evidence that backs the claim and will be presented at the pre-trial hearing. Witness testimony is heard at trial.

**f. Interim measures**

All courts may consider the full range of interim measures under CJP Ch. 7, where applicable.

**g. Court directed settlement option during procedure**

Yes.

**h. In case of out of court settlements: judicial control**

The court may affirm a settlement reached by the parties (reached in or out-of-court) upon their request. The settlement may pertain to some claims or all claims of the cumulated claims. A settlement may not be confirmed if it is contrary to law, clearly unreasonable or if it violates the right of a third party (CJP 20:3(2)). It is likely that a Finnish court will not affirm a settlement including punitive damages or exigent fees, since it would be considered contrary to Finnish law.

**3. Available Remedies**

**a. Type of damages**

Finnish law does not recognize punitive damages. Only actual damages, direct or indirect may be compensated.

**b. Allocation of damages between claimants for compensatory claims/ distribution methods**

Case law is not sufficient to draw conclusions.

**c. Availability of punitive or extra-compensatory damages and their conditions**

Not available under Finnish law.

**d. Skimming-off/ restitution of profits**

Not an issue in Finland, but case law is not sufficient to draw conclusions.

**e. Injunctions**

All courts may issue injunctions in summary proceedings or after hearing the case.

**f. Possibility to seek an injunction and compensation within one single action.**

Yes.

#### **g. Possibility to rely in an injunction in separate follow-on individual or collective damages actions**

Injunctions would likely target certain activity on the part of the trader, and an injunction would be set on pain of fine against renewing the unlawful activity, not as such against a particular plaintiff. Claimants, who would have missed the window for joining the cumulated claim, would absent lapse of right on other grounds, likely reach settlement on the same grounds to avoid further litigation costs.

#### **h. Limitation periods**

General rules discussed above.

### **4. Costs**

The Loser Pays Principle governs all civil disputes, which includes reasonable attorney fees.

### **5. Lawyers' Fees**

A peculiar side-track in the Tobacco-cases involved, whether plaintiff's attorney would be jointly liable for attorney fees in a criminal battery trial. The district and appellate courts ordered plaintiff's attorneys to pay damages for prolonging the proceedings and providing false evidence regarding the causal connection between tobacco products and cancer. The Supreme Court reversed, stating that disagreeing with the prosecutor's view on causal connection did not constitute false witness provided that the presented evidence is not demonstrably false.<sup>269</sup>

### **6. Funding**

No public information available.

### **7. Enforcement of collective actions/settlements**

#### **a. Framework for enforcement**

General procedures for enforcement apply, including the aid of the Executive proceedings.

#### **b. Efficient enforcement of compensatory/ injunctive order**

No cases available. Finnish enforcement procedures are very efficient as can be seen for example enforcement of judgments relating to copyright infringement against individuals.

#### **c. Cross border enforcement**

No information available.

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<sup>269</sup> KKO 2001:65.

## 8. Number and types of cases brought/pending

The cases discussed in this section are intended to address the questions related to profiting from litigation, the Loser Pays -principle and lawyer's fees. With the current design of the CAA a case can only be brought by the Consumer Ombudsman. Hence, ad hoc licenses, within the meaning of the Commission Recommendation, for other entities or individuals are not available under Finnish law. The cases discussed here, are high profile cases targeting one or a few companies by one lawyer or law firm. Finnish courts have dealt with only a few cases with some characteristics of a class action under general procedural law. The Tobacco-cases tested the Finnish legal system with the stated goal of procuring precedent for further law suits on similar grounds. The first case was brought in 1988, involving one plaintiff, Aho, who'd been smoking from 1941 to 1986, when he was diagnosed with throat cancer and chronic bronchitis. All courts found that Tobacco companies were liable for causing illness or injury, but failed to find a causal connection between Aho's throat cancer and his use of tobacco products.<sup>270</sup> The case turned on the question of whether the tobacco companies were liable for misleading consumers in advertising, despite general knowledge of the health risks relating to smoking. The widow of Aho successfully brought a claim against the Finnish government before the European Court of Human Rights, and was awarded 8 000 euros in damages and 2000 euros in costs for the prolonged proceedings (12 years) in the Finnish court system.<sup>271</sup>

The second strand of Tobacco -cases had four plaintiffs who had been smoking light cigarettes both as minors and adults. These cases involved tobacco advertising that allegedly led consumers to believe that light tobacco products were less harmful than traditional cigarettes. The plaintiff's lost in both district court and on appeal, but the request for appeal to the Supreme Court was withdrawn, after the parties had reached a settlement. The terms of the settlement have been kept confidential. At the time of settlement plaintiff's stood to incur liability for FIM 800 000 (roughly equivalent to 120 000 euros) in defendant's attorney fees, under the Loser Pays- Principle.<sup>272</sup> Professor Erkki Aurejärvi, the main attorney in all 22 years of litigation of the Tobacco-cases in Finland, did not profit from the litigation.

In May 2015, Professor Aurejärvi approached the Consumer Ombudsman on behalf of Mr. Glan, who had used nicotine products designed to help consumers quit smoking. The effort is made to prompt the Consumer Ombudsman to bring a class action against tobacco companies for the sale and promotion of electronic tobacco and other tobacco substitutes.

In 2016, the news broke that Nokian Renkaat Ltd., a leading tyre-manufacturer admitted to cheating in industry tyre-tests, by submitting tyres for testing that were of superior quality than those sold to customers. On

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<sup>270</sup> KKO 2001:58

<sup>271</sup> Case Aho v. Finland, ECtHR judgment 16.10.2007, Application 2511/02. "On the date of entry into force of the Convention with respect to Finland, the compensation claim had been pending before the District Court for two years. The court gave judgment one year and some nine months later. It thus took it three years and eight months to examine the claim. The Court of Appeal gave judgment six years and some eleven months later and the Supreme Court a further two years and some five months later"(para. 44). "Notwithstanding the undoubted complexity of the case the length of the proceedings was excessive and failed to meet the "reasonable time" requirement" (para.49).

<sup>272</sup> Saarikoski, Mikael- Ellonen, Jarmo: Kevytsavukeoikeudenkäynti Suomessa 2005-2010, Terveyden ja hyvinvoinnin laitos Raportti 18/2012, p. 18.

2.3.2016, Turre Legal Oy reportedly filed a group claim on behalf of customers that had bought tyres affected by manipulated tests.<sup>273</sup> The customers included consumers and businesses with an estimated damage 500-1500 euros. According to the leading attorney, the claim was calculated at a rate of a 30 % discount on the price of the tyres, which would reflect the price reduction between a top-testing tyre and an average-testing tyre. Turre Legal Oy reportedly represents 250 complainants, who had bought app. 300 sets of tyres over the last ten years. Nokian Renkaat Ltd. has publicly refused to negotiate with Turre Legal Oy. Turre Legal has reportedly transferred the bulk of the claims to the Consumer Disputes Board in November 2016, citing Nokian Renkaat Ltd's refusal to negotiate.<sup>274</sup> The Consumer Disputes Board had already received and decided claims from individuals, where compensation had not been recommended.

## **9. Impact of the Recommendation/Problems and Critiques, including**

### **a. Impact of the collective mechanism (or lack of) on behaviour/ policy of stakeholders (direct/ indirect, economic/social impact)**

The government bill cited the Swedish experience in the Skandia-case<sup>275</sup>, as an example of the type of impact desired for Finland. The consumers in question were not awarded compensation, only access to observe closed arbitration proceedings. Acting *en mass*, the class was able to induce a corporate entity to change their behaviour, a feat not likely accomplishable through individual redress.<sup>276</sup> In Finland, the Tobacco-cases have influenced Finnish tobacco legislation and in particular the restrictions the sale of electronic cigarettes and nicotine fluids. While the Consumer Ombudsman is an efficient institution in enjoining and curtailing unlawful trading practices<sup>277</sup>, the private class actions seem to seek social impact, rather than direct monetary compensation or gain.

### **b. Problems relating to access of justice/fairness of proceedings including**

#### **Restrictions on access to justice negatively affecting collective redress**

Individuals have other means of redress for compensation either through Consumer Disputes Board free of charge or through general court.

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<sup>273</sup> Helsingin Sanomat 2.3.2016: Nokian Renkaita vastaan vireillä "joukkokanne" – asiantuntija epäilee rahastusta ja varoittaa tuhansien eurojen oikeudenkäyntikuluista.

<sup>274</sup> MTV Uutiset, 9.11.2016 Lakifirma sysää Nokian Renkaiden asiakkaiden ratkaisupyynnöt kuluttajariitalautakunnan ratkaistavaksi.

<sup>275</sup> An association representing 15 000 retirement plan-savers was given a license for a private class action claim against Skandia, whose internal corporate practices in restructuring the business had favored the mother company and cost the Swedish branch a loss of 1 billion SEK.

<sup>276</sup> HE 154/2006, p. 27.

<sup>277</sup> Katja Lindroos- Joonas Huuhtanen: Country report -Finland at pp. 344 in Study for the Fitness check of consumer and marketing law, European Union, May 2017.



### **Time and burden of collective actions on courts and parties compared to non-collective litigation**

Time and burden is high, since class action is generally free of charge and low-risk.

### **Risks of and examples for abusive litigation**

None

### **Effective right to obtain compensation**

None/slim

## **II. Sectoral Collective Redress Mechanism(s) (if any) – Class Action**

### **1. Scope/ Type**

#### **a. Sectoral**

The scope of class action, as regulated by the Class Action Act, is limited to consumer sales, specifically to disputes between a consumer and a trader for trading goods or services. Furthermore, certain financial services within the consumer sector are excluded from the scope of Class Action Act (CAA section 1). This is incompatible with the Commission Recommendation 2013/396/EU art. 1, which aims to facilitate access to justice, stop illegal practices and enable injured parties to obtain compensation in mass harm situations caused by *any* violation of rights under EU law. However, the financial services sector is heavily regulated in Finland and supervised by the Financial Supervisory Authority.<sup>278</sup>

The Class Action Act was originally intended to cover environmental damages in addition to consumer claims, but this approach was later abandoned, as various actors expressed concerns regarding the designation of a competent authority to act as plaintiff in these matters. Another cause for concern was the intention to grant a secondary license for organizations to act as plaintiff in claims based on environmental damages.<sup>279</sup>

#### **b. Injunctive or compensatory or both**

The scope of class action is not limited to either injunctive or compensatory claims.

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<sup>278</sup> For interviews by stakeholders and Financial Supervisory Authority on consumer protection in the financial services market see Katja Lindroos- Joonas Huuhtanen: Country report -Finland at pp. 344 in Study for the Fitness check of consumer and marketing law, European Union, May 2017.

<sup>279</sup> HE 154/2006, p. 31. Furthermore, the consumer sector was deemed the best choice for testing the collective redress mechanisms in practice, and the scope of the legislation could later on be extended to other sectors.

## **2. Procedural Framework**

### **a. Competent Court**

For class actions, there are five competent courts, one in each appellate court district. These are the district courts of Turku, Vaasa, Kuopio, Helsinki and Oulu. The competent court out of the five aforementioned district courts is the one that is located within the appeal court district where the defendant would normally be obliged to answer to civil charges made against him (CAA section 3). This differs from the general forum arrangement to ensure, that the courts processing class actions possess the necessary resources and expertise. It was also anticipated that the courts would be processing only isolated class action cases each year, and as such focusing the cases to selected courts was the only way to enable to courts to establish functional procedural practices and routines.<sup>280</sup>

### **b. Standing**

The Consumer Ombudsman (kuluttaja-asiamies) is the designated entity to act as a representative and initiate class actions in the consumer sector. As the general authority, whose objectives include the supervision that the Consumer Protection Law and other laws passed to protect consumers are observed, the Consumer Ombudsman can be considered to meet the requirements set in Commission Recommendation 2013/396/EU art. 4.<sup>281</sup>

This arrangement also ensures, that the collective redress mechanisms are not used for abusive litigation, as such concerns were expressed during the legislation process.<sup>282</sup> As the Consumer Ombudsman is publicly funded, the risk that collective redress mechanisms would create an incentive for litigation that is unnecessary from the point of view of the interest of any of the parties involved, is greatly reduced.

### **c. Availability of Cross Border collective redress**

In cases where the dispute concerns natural or legal persons from several Member States, the competency of the court is not determined by the Class Action Act, but would in most cases be determined by international treaties and community legislation.<sup>283</sup> For enterprises incorporated abroad and without a place of operation in Finland, the District Court of Helsinki would be the appropriate forum under Finnish consumer law.

### **d. Opt In/ Opt Out**

#### **Principal availability of either/or/both options?**

In regards to the forming of the claimant class, Finnish legislation has adopted the Opt In approach, in accordance with Art. 21 of the Commission Recommendation. Furthermore, any member of the claimant class may leave the class at any time before the final hearing. After this, leaving the class is only allowed with the consent of the defendant (CAA section 15).

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<sup>280</sup> HE 154/2006, p. 37.

<sup>281</sup> While The Consumer Ombudsman does not primarily resolve individual disputes where the consumer seeks reimbursement for an error with a product or service, he or she may aid the consumer as necessary in resolving individual disputes, if its resolution carries a significant impact on the interpretation of the law or the general well-being of consumer.

<sup>282</sup> HE 154/2006, p. 16.

<sup>283</sup> HE 154/2006, p. 38

## **Conditions for either type (prescribed by law or discretion of the judge?)**

General condition for Opting In is that the individual and the claimant class have a similar claim against a common defendant. Application to the class requires a signed notification to the Consumer Ombudsman, who acts as plaintiff in all class actions (CAA section 8). It is also her/his responsibility to determine each applicant's qualification to the class.

### **e. Main procedural rules**

#### **Admissibility and certification criteria**

In Finland, the application of class action has the following requirements (CAA section 2):

- Several persons have claims against the same defendant, based on the same or similar circumstances
- The hearing of the case as a class action is expedient in view of the size of the class, the subject-matter of the claims presented in it and the proof offered in it
- The class has been defined with adequate precision

All of the aforementioned criteria must be met. The evaluation of the requirements is performed by the competent court at the same time when the claim is being processed. This is in accordance with Art. 8 of the Commission Recommendation 2013/396/EU. The admissibility of the case is in no way limited by the size of the group. However, the suitable size of the group would be determined through practical considerations.<sup>284</sup>

#### **Single or Multi-stage process**

In Finland, initiating a class action is a two phase procedure. In the first phase the Consumer Ombudsman files a claim as in any other civil process. This is processed by the court, which determines whether the requirements for class action set out in CAA section 2 are met. If the court determines that the case may be processed as a class action, the Consumer Ombudsman is notified. He will then assemble the class and present their claims to the court.

According to the Class Action Act section 5, the claim shall contain the following information:

- the class to which the action pertains (definition of the class and all the known individual members of the class)
- the known claims
- the circumstances on which the claims are based
- the basis on which the case should be heard as a class action (as detailed in CAA section 2)
- the circumstances, as known to the plaintiff, that are relevant to the hearing of the claims of given class members only
- in so far as possible, the evidence that the plaintiff intends to offer in support of the action, as well as the facts that the plaintiff intends to prove with each item of evidence

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<sup>284</sup> HE 154/2006, p. 18.

- a claim for the compensation of legal costs, if the plaintiff deems this necessary
- the basis for the competence of the court (in accordance with CAA section 3)

After the time for class application has expired, the Consumer Ombudsman has one month to submit a supplemented application for summons to the court. This supplemented application for a summons must indicate the names and addresses of the class members, the particulars of their claims and, if necessary, supplemented grounds for the claims.

### **Case-management and deadlines**

Unless the claim is dismissed as a class action, the court must notify each member of the class of the start of the class action process. This should be done by mail or email. If this not possible, the notification on the class action may be posted in one or more newspapers or other suitable media. In addition to this notification, the court must set a deadline for Opting In, which may later be extended by the court when necessary (CAA section 6).

### **Expediency (particularly in injunctive cases)**

Consumer Ombudsman may request a preliminary injunction issued by the Market Court, which may be reinforced by a notice of a conditional fine. A temporary injunction may be considered in a written procedure if necessary (Market Court Proceedings Act chapter 5 section 9).<sup>285</sup>

### **Evidence/discovery rules**

The Class Action Act does not contain any specific provisions on the use of evidence in class action procedure. However, the expected use of evidence is still taken into the account at the time of evaluating the claims admissibility as a class action (see CAA section 2). Particularly cases that are expected to require varied individual evidence from each member should be processed individually instead of a class action.<sup>286</sup>

### **Interim measures**

Consumer Ombudsman may request a preliminary injunction issued by the Market Court. This injunction may be reinforced by a notice of a conditional fine. If the violation of consumer protection or marketing law is not legally significant, the Consumer Ombudsman may also issue this injunction independently. If done so, the injunction must be brought to the Market Court within three days or it will cease (Consumer Ombudsman Act, section 7).<sup>287</sup>

### **Court directed settlement option during procedure**

The Class Action Act does not contain any specific provisions on court directed settlement during the class action procedure. As the general provisions on civil procedure apply to class actions, general preconditions for settlement are evaluated at the start of the process (CJP Ch. 5:19), and as a plaintiff, the Consumer Ombudsman may accept or negotiate a settlement on behalf of the

<sup>285</sup> Laki oikeudenkäynnistä markkinaoikeudessa 100/2013.

<sup>286</sup> HE 154/2006, p. 20. This does not mean that individual evidence may not be presented at all. For example, individual evidence on extent of damages could be presented in a class action lawsuit, where the rest of the legal facts are common for the whole class.

<sup>287</sup> Laki kuluttaja-asiamiehestä 40/1978.

claimant class at any time.<sup>288</sup> The settlement shall then be affirmed by the ruling court in accordance to the provisions set in CJP Ch. 20.

### **In case of out of court settlements: judicial control**

Judicial control over out of court settlements in class actions belongs to the Consumer Ombudsman.

## **3. Available Remedies**

### **a. Type of damages**

There are no specific limitations as to damages covered by class actions. However, Finnish law restricts damages to actual damages.

### **b. Allocation of damages between claimants for compensatory claims/ distribution methods**

The CAA section 16 is phrased in a way that requires the ruling court to identify and specify every member of the claimant class and, for example, their individual compensation. For compensatory claims, the allocation of damages between the claimants is based on the demands of the claim (CAA section 5). As such, it is not possible to file a claim based on a single figure, and divide this between the members of the class afterwards.<sup>289</sup>

### **c. Availability of punitive or extra-compensatory damages and their conditions**

Punitive damages are not available under Finnish law.

### **d. Skimming-off/ restitution of profits**

The Consumer Ombudsman acts ex officio and is funded by the government.

### **e. Injunctions**

The Consumer Ombudsman may issue injunctions on pain of fine.

### **f. Possibility to seek an injunction and compensation within one single action**

Yes, in theory. In practice, the Consumer Ombudsman negotiates compensation and may, if necessary (not voluntary compliance) issue an injunction.

### **g. Possibility to rely in an injunction in separate follow-on individual or collective damages actions**

No, since Consumer Ombudsman is recognized as the only plaintiff under the Class Action Act.

### **h. Limitation periods**

General statute of limitations are discussed above.

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<sup>288</sup> HE 154/2006, p. 22.

<sup>289</sup> HE 154/2006, p. 48

## **4. Costs**

### **a. Basic rules governing costs and scope of the rules**

In Finland, the general rules governing costs of legal process, as specified in the Code of Judicial Procedure Ch. 21 apply to class actions.

### **b. Loser Pays Principle (and exceptions from it)**

According to the Code of Judicial Procedure Ch. 21 section 1, the loser is accountable for all the necessary and reasonable legal costs. The exception from this general rule in class actions is that the members of the claimant class are not held personally accountable for any legal costs (CAA section 17). As such, the legal costs are distributed between the Consumer Ombudsman and the defendant as determined by the Code of Judicial Procedure. A Member of the class can, however, be held accountable for any costs to the defendant caused by said members infringement of the rules provided in the Code of Judicial Procedure Ch. 21 section 5, such as failing to appear in court, or providing false information as part of testimony. The member of the class is responsible for extra costs incurred by such action.

## **5. Lawyers' Fees**

The fees are born by the parties according to the Loser Pays Rule. However, since the Consumer Ombudsman is the official plaintiff, members of the class are not obligated to pay lawyer's fees, if the case is lost. Thus, the lawyer fees of the defendant are recoverable from the state if the class action is unfounded.<sup>290</sup>

## **6. Funding**

The Class Action Act does not provide any specific restrictions to the funding of class actions, or provisions on conditions or control of third party funding as detailed in Arts. 15 and 16 in the Commission Recommendation 2013/396/EU. However, as the Consumer Ombudsman acts as a plaintiff in all class action, and the individual claimants are not held accountable for any legal costs, this has not been seen as a major problem.

## **7. Enforcement of collective actions/settlements**

There are no specific provisions on enforcement of collective actions/settlements.

There are no specific provisions on cross-border enforcement, however, the Consumer Ombudsman may persuasively utilize its official capacity to induce compliance.

## **8. Number and types of cases brought/pending**

No class action claims have been filed by the Consumer Ombudsman (June 2017).

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<sup>290</sup> HE 154/2006 p. 23.

## **9. Impact of the Recommendation/Problems and Critiques**

### **a. Consequences where no collective redress mechanism is available**

The Consumer Ombudsman has general jurisdiction, and has successfully negotiated contract terms also in industries regulated by sector-specific regulation that are outside the scope of the Class Action Act. This has reduced the need for sector-specific collective redress mechanisms in the Finnish legal system.<sup>291</sup>

### **b. Impact of the collective mechanism (or lack of) on behaviour/policy of stakeholders (direct/ indirect, economic/social impact)**

The Class Action Act has been criticized as being too lenient, the major problem being that the competence to file a class action claim is exclusive to the Consumer Ombudsman, who has so far favoured a more conciliatory approach to mass harm situations. It has been proposed, that the competence should be expanded to both private citizens and interest groups, and the scope of collective redress mechanisms be expanded to include environmental damages. It has also been pointed out on several occasions, that the fact that the Class Action Act has not been applied even once since it was enacted in 2007, is proof enough of its inefficiency<sup>292</sup>

Other criticism has been pointed at the swiftness of the available collective redress mechanisms. As many frauds directed at consumers operate on a very limited time frame, the applicability of either class act or group complaint is only theoretical.<sup>293</sup> Class action has also been viewed as an extremely expensive approach, estimated costs of extensive cases easily reaching hundreds of thousands of euros, and consumer interest groups have pointed out that the Competition and Consumer Authority likely lacks the necessary resources for such an undertaking.

As to the inefficiency of the Class Action Act, the Consumer Ombudsman has pointed out, that while it is true that no class action claims have been filed as of yet, the current legislation does have a major preventive function, and that the authorities have had considerable success in reaching desirable outcomes through negotiations between the conflicted parties.<sup>294</sup> Considering this, and the fact that the primary function of the Competition and Consumer Authority is to observe that traders behave in accordance with existing legislation, instead of resolving individual disputes, the authorities have shown reluctance at changing their stance on the use of collective redress mechanisms.

Other interest organizations have pointed out, that the lack of active use of the available collective redress mechanisms implies that both the Competition and Consumer Authority and the Financial Supervisory Authority are

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<sup>291</sup> On the general jurisdiction of the Consumer Ombudsman, see. *Study for the Fitness Check of EU consumer and marketing law*, Study to support the Fitness Check of EU Consumer law – Country report FINLAND p. 344.

<sup>292</sup> Consumer organizations such *Finnish Consumer Association* (Kuluttajaliitto) have been particularly keen on these issues. see. [https://www.kuluttajaliitto.fi/wp-content/uploads/2016/09/18\\_2012.pdf](https://www.kuluttajaliitto.fi/wp-content/uploads/2016/09/18_2012.pdf).

<sup>293</sup> Competition and Consumer Authority publication, p. 36. <https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/selvitykset/2016/kkv-selvityksia-1-2016-kuluttajahuijaukset.pdf>

<sup>294</sup> See the case involving Caruna Ltd. the owner of electricity transmission network in Finland, detailed in the *Study for the Fitness Check of EU consumer and marketing law*, Study to support the Fitness Check of EU Consumer law – Country report FINLAND, p. 363.

functioning efficiently in providing protection and preventing mass harm situations. As such, the need for collective redress mechanisms in Finland is relatively low.<sup>295</sup> Particularly the business sector has expressed opinions that collective redress mechanisms are generally ill-suited for Finnish legal system, and that they have a negative impact on Finland's competitiveness in the international market.<sup>296</sup>

### **c. Incompatibilities with the Recommendation's principles**

While the Finnish Class Action Act is in accordance with many provisions of Commission Recommendation 2013/396/EU, such as the Opt In approach, Loser Pays principle and limiting representative actions to designated non-profit making character, there are some major incompatibilities, the most noteworthy being the scope of the available collective redress mechanisms.

While the Commission Recommendation aims to facilitate collective redress mechanisms to all violations of rights under the EU law, Finnish legislation restricted the use of collective redress to consumer sector exclusively. This approach was adopted in the late stages of the legislation process, as the consumer sector was considered the best option for testing the performance of collective redress mechanisms in Finnish legal system.<sup>297</sup> As the application of these mechanisms in the consumer sector has been reserved at best, the discussion on expanding the scope of the Class Action Act to environment damages has not yet lead to legislative action.

Other notable differences are the lack of specific provisions on third party funding of collective actions or collective alternative dispute resolution and settlements. While these may be viewed as incompatibilities, it is worth noting that no widespread criticism has been directed at the Finnish legislation in these areas. This may be due to the authority centric approach to representation, as well as the general procedural provisions on civil process that also apply to collective redress mechanisms.

### **d. Problems relating to access of justice/fairness of proceedings including**

#### **Time and burden of collective actions on courts and parties compared to non-collective litigation**

In the consumer sector, a court proceeding can be a cumbersome and costly process, especially considering that many of the cases are based on interests of 1500 euros or less. This reduces the consumer's willingness to seek redress through courts, especially in the light of the Loser Pays principle, when there is even the slightest chance of losing the case. As such, without the availability of collective redress mechanisms, consumer's socio-economical position might pose an obstacle for access to justice. Due to the fact that the Consumer Ombudsman acts as plaintiff in all class action lawsuits, the availability of collective redress mechanisms can be seen to improve the overall access to justice. As the ruling of the competent court is binding to all

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<sup>295</sup> Central Chamber of Commerce (Keskuskauppamari), <https://kauppamari.fi/2013/06/12/eulta-siedettava-ryhmakannesuositus/>

<sup>296</sup> Dan Frände etc. at *Prosessioikeus*, 2017, p. 1290.

<sup>297</sup> HE 154/2006, p. 31. It was considered, that the collective redress mechanisms could later be expanded to environmental damages if the experiences from the consumer sector proved favorable.



the members of the class, application of collective redress mechanisms is reasonable from the process economical point of view as well.<sup>298</sup>

The lack in pursuit of collective actions in practice is likely due to the complexity of and time-consuming nature of such cases. The Consumer Ombudsman has preferred to use non-litigious methods for consumer protection. When the application of class action is considered unsuitable for a particular case, consumers may file an individual complaint to the Consumer Disputes Board free of charge.

### **Risks of and examples for abusive litigation**

None

### **Effective right to obtain compensation**

None/slim

## **III. Sectoral Collective Redress Mechanism(s) – Group Complaint**

### **1. Scope/ Type**

Group complaints, based on the Consumer Disputes Board Act, are strictly restricted to the consumer sector. This form of collective redress resembles the afore-discussed class action in many ways, with a few major differences.

#### **Injunctive or compensatory or both**

Compensatory claims may be processed as a group complaint. The Consumer Ombudsman has jurisdiction to grant injunctions or seek one from the Market Court.

### **2. Procedural Framework**

#### **a. Competent Court**

Group complaints are directed at the Consumer Disputes Board, which is a neutral and independent expert body whose members represent consumers and business in a balanced way. The Consumer Disputes Board is not a monitoring authority, and the decisions reached by the Board are only recommendations concerning the resolution of a dispute. As such, the Board's decisions are not binding in the same way as a court ruling.<sup>299</sup> For this same reason, the provisions regarding the group complaint are intentionally left to allow more flexibility.<sup>300</sup>

#### **b. Standing**

As in the case of group complaints, the Consumer Ombudsman is the designated entity to act as a representative and initiate group complaints on

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<sup>298</sup> HE 154/2006, p. 12-13.

<sup>299</sup> Approximately 80% of businesses comply with the Board's decisions, however. <http://www.kuluttajariita.fi/en/index/valituksenteko.html>. Published 12.7.2013.

<sup>300</sup> HE 115/2006. p. 9.

behalf of multiple consumers, who have or may be expected to have similar demands against a business in the same matter. As to the qualifications under Art. 4 of the Recommendation 2013/396/EU, Finland has implemented only the option in Art. 4(7) without alternatives.

**c. Availability of Cross Border collective redress**

There are no specific provisions for Finland relating to cross border collective redress. The Consumer Disputes Board will hear any claim brought by a consumer and based on a consumer sale in Finland.

**d. Opt In/ Opt Out**

Neither. The application of group complaint is solely under discretion of the Consumer Ombudsman, who may on his or her own initiative file a claim to the Consumer Disputes Board. A group complaint can, for example, be filed if multiple consumers have bought a product with the same design or manufacturing defect, or a service that does not correspond to what has been agreed upon.

**e. Main procedural rules**

**Admissibility and certification criteria**

The jurisdiction of the Consumer Disputes board is restricted to Business to Consumer transactions. The Consumer Disputes Board follows written procedure.

**3. Available Remedies**

Recommendation of payment of compensation to a specified amount. Usually a price reduction, but sometimes the full price.

**a. Availability of punitive or extra-compensatory damages and their conditions**

Not available under Finnish law.

**b. Skimming-off/ restitution of profits**

Not applicable to these proceedings.

**c. Injunctions**

Not available in these proceedings.

**d. Possibility to seek an injunction and compensation within one single action**

No.

**e. Possibility to rely in an injunction in separate follow-on individual or collective damages actions**

No.

#### **4. Costs**

The Consumer Disputes Board handles cases free of charge. Activities are funded through the state budget. As a rule, parties are responsible for covering any costs they may incur, however (Consumer Disputes Board Act 2 section 19). These costs are generally much smaller than in legal proceedings.

#### **Basic rules governing costs and scope of the rules**

Parties bear their own costs in Consumer Dispute Board proceedings.

#### **5. Lawyers' Fees**

Not applicable, since both Consumer Ombudsman and Consumer Disputes Board are publicly funded.

#### **6. Funding**

Not applicable to group complaints.

#### **7. Enforcement of collective actions/settlements**

The Consumer Disputes Board handles most of the consumer complaints and effectively induces businesses to comply with non-binding rulings favouring compensation. The Competition and Consumer Authority publishes a black list of traders who do not comply with the Consumer Disputes Board's recommendations.

#### **8. Number and types of cases brought/pending**

There has been one reported instance where group complaint has been used, in 2011. The claims were based on misleading marketing information regarding apartment deals, made by a construction company Peab Ltd. These claims were dismissed in the Consumer Disputes Board in 2012.

While there have been no other reported cases of group complaints having been initiated, the authorities have stated that just the availability of such collective redress mechanisms has increased businesses' willingness negotiate, and as such has helped to reduce the need to resort to such mechanisms.<sup>301</sup>

#### **9. Impact of the Recommendation/Problems and Critiques**

As a collective redress mechanism, group complaint and class action possess many similar incompatibilities with the Commission Recommendation

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<sup>301</sup> Case of Caruna Ltd. electricity transfer price increases in the early 2016 was particularly publicized, due to the large number of individuals affected. The Consumer Ombudsman was reported to having considered the option of filing a class action claim, but the parties reached an acceptable agreement through extensive negotiations. see: <https://www.kkv.fi/en/current-issues/press-releases/2016/18.2.2016-caruna-and-the-consumer-ombudsman-reach-a-negotiated-solution--caruna-will-phase-in-price-increases-over-a-longer-period-of-time/>

2013/396/EU. As with class action, the group complaint is similarly restricted to consumer sector exclusively, as is the jurisdiction of the Consumer Disputes Board. Overall, the provisions on group complaint are relatively flexible. For instance, the Consumer Disputes Board Act does not contain any specific provisions on alternative dispute resolution mechanisms regarding group complaint, and yet the Consumer Ombudsman has had considerable success in negotiating acceptable terms between the conflicted parties, as was evident in the case of Caruna Ltd.<sup>302</sup>

## IV. Information on Collective Redress

### 1. National Registry

As no class actions have been initiated at the time of this report (June 2017), there is no national registry specifically for collective redress actions. However, should the need arise, it is likely that any information on collective redress actions would be published through the web-site of the Competition and Consumer Authority. The Competition and Consumer Authority publishes all decisions of the CDB and Consumer Ombudsman on its web-site.

### 2. Channels for dissemination of information on collective claims

The Competition and Consumer Authority, including the sites of the Consumer Disputes Board and Consumer Ombudsman's Office is an effective channel for dissemination of information. The Consumer-magazine is also published by the Competition and Consumer Authority.

## V. Case summaries

<p><b>Case name</b> Peab Ltd.</p> <p><b>Reference</b> <a href="https://www.kkv.fi/ajankohtaista/Tiedotteet/kuluttajavirasto/2012/19.4.2012-ryhmavalitus-peab-oyta-vastaa-kaatui-kuluttajariitalautakunnassa/">https://www.kkv.fi/ajankohtaista/Tiedotteet/kuluttajavirasto/2012/19.4.2012-ryhmavalitus-peab-oyta-vastaa-kaatui-kuluttajariitalautakunnassa/</a></p> <p><b>Subject area</b> Consumer</p>	<p><b>Keywords</b> Consumer, dispute, marketing, construction</p> <p><b>Summary of claims</b> The claim was made on behalf of 11 shareholders, who demanded rebate on the apartment deals made with Peab Ltd.. The claims were based on misleading information provided during the marketing process, specifically the information on condominium payments. The individual claims varied</p>
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<sup>302</sup> <https://www.kkv.fi/en/current-issues/press-releases/2016/18.2.2016-caruna-and-the-consumer-ombudsman-reach-a-negotiated-solution--caruna-will-phase-in-price-increases-over-a-longer-period-of-time>

	between 6000-9000€, depending on the size of the apartment.
<b>Dispute resolution method</b> Group Complaint	<b>Findings</b>  The Consumer Disputes Board came to a conclusion, that the information provided during the marketing process was only an estimate, and therefore not to be taken exactly.  <b>Outcomes</b>  The board concluded that there had been no infringement, and therefore no compensation was recommended.
<b>Court or tribunal</b> Consumer Disputes Board	
<b>Cross-border character/ implications, if any</b>	
<b>Opt-in/out</b> Neither, see 19 q	
<b>Type of funding</b> None	
<b>Costs</b> Publicly funded	
<b>Abusive litigation</b> no	
<b>Case name</b> Caruna Ltd.  <b>Reference</b> <a href="https://www.kkv.fi/en/current-issues/press-releases/2016/18.2.2016-caruna-and-the-consumer-ombudsman-reach-a-negotiated-solution--caruna-will-phase-in-price-increases-over-a-longer-period-of-time/">https://www.kkv.fi/en/current-issues/press-releases/2016/18.2.2016-caruna-and-the-consumer-ombudsman-reach-a-negotiated-solution--caruna-will-phase-in-price-increases-over-a-longer-period-of-time/</a>  <b>Subject area</b> Consumer	<b>Keywords</b> Consumer, dispute, electricity, pricing, alternative dispute resolution  <b>Summary of claims</b>  Caruna Ltd., the owner of electricity transmission network in Finland, after purchasing the network from the government in 2014, informed their clients of a rise in the basic electricity transmission fee by 22-27%. Caruna claimed raised costs due to necessary investments in the network. From consumer's point of view, such a substantial one time increase was considered unreasonable.

<p><b>Dispute resolution method</b></p> <p>Settlement</p> <p><b>Court or tribunal</b></p> <p>Consumer Ombudsman</p>	<p><b>Outcomes</b></p> <p>Settlement: yes</p> <p>Remedy: The Consumer Ombudsman intervened and reached a settlement with Caruna, to reduce the raise by 25 % in 2016, refrain from raises in 2017, and keep future raises within 10-15% stretched over a longer period of time, and calculated on the consumer's earlier fee, including VAT.</p>
<p><b>Cross-border character/ implications, if any</b></p> <p>None</p>	
<p><b>Opt-in/out</b></p> <p>N/A</p>	
<p><b>Type of funding</b></p> <p>None</p>	
<p><b>Costs</b></p> <p>N/A</p>	
<p><b>Abusive litigation</b></p> <p>No</p>	

# FRANCE – FACTSHEET

## **Scope**

French law does not provide for a horizontal collective redress mechanism.

Sectoral mechanisms are implemented in consumer, competition and health law (compensatory), discrimination and environment (injunctive and compensatory), and data protection (injunctive).

## **Standing** (Para. 4-7)

In all sectors: associations must be duly registered, with for statutory aim to protect these specific rights.

Consumer and competition: national representative consumer associations accredited by the government, with at least one year of existence.

Discrimination: trade unions and associations with five years of existence.

## **Admissibility** (Para. 8-9)

The admissibility of the claim is dealt with in the first stage of a collective action.

## **Information on Collective Redress** (Para. 10-12, 35-37)

After a final decision on admissibility, the court decides on the publicity measures to be taken, costs borne by the defendant.

Information about ongoing consumer collective redress proceedings is available on the website of the National Consumer Institute.

## **Problems/Incompatibilities with Recommendation principles**

Publicity campaigns undertaken by parties: it appears that associations have accompanied their filings with intensive outreach campaigns launched at the very first stage of the action. This creates reputational costs for companies. In reply, companies develop their own information strategies targeting individuals.

Lawyer-driven litigation: Some initiatives have encouraged the launch of web platforms aiming at informing individuals and at collecting complaints against companies (for instance: [www.actioncivile.com](http://www.actioncivile.com))

## **Funding** (Para. 14-16)

The current regime provides for public support of group action proceedings.

To date, the associations bringing the claims have been funding the actions.

The court can direct the defendant to provide the claimant association(s) with advance payments in respect of costs and expenses arising out of constitution of the group.

## **Problems/ Incompatibilities with Recommendation principles**

There is no specific provision relating to third party funding.

## **Cross Border Cases** (Para. 17-18)

Currently no collective action involves foreign plaintiffs.

There are no specific rules or limitations as to the participation of foreign claimants.

### **Expedient procedures for injunctive orders** (Para. 19)

Under art. L621-9 of the Consumer Code, the association can intervene and ask the Court to apply, where necessary, injunctive relief: if the Court recognises a violation, it can order interim and conservatory measures.

### **Efficient enforcement of injunctive orders** (Para. 20)

The judge who ruled on liability also decides on difficulties which might arise during the implementation stage of the judgment.

The association is deemed to be a creditor and can request interim and conservatory measures to compel the defaulting debtor to perform its obligation, if necessary under penalty in the case of non-compliance.

### **Opt In/Opt Out** (Para. 21-24)

Opt-in system

Consumer and competition: following the judgement on liability and after the implementation of publicity measures, consumers have up to six months to join the proceedings.

Health: the time limit for opting in is between six months and five years.

### **Collective ADR and Settlements** (Para. 25-28)

Associations can settle the case on behalf of the claimants. Judicial approval is required for any out of court settlement agreement.

The settlement agreement must specify the publicity process, the dates and the criteria for inclusion in the settlement and the court must verify that the settlement agreement correctly and sufficiently protects the claimants' interests.

### **Costs** (Para. 13)

The court may order the losing party to pay the winning party's lawyer's and/or expert's fees (taking into consideration rules of equity and financial condition of the party).

Court costs are usually borne by the losing party unless the judge decides otherwise.

### **Lawyers' Fees** (Para. 29-30)

Contingency fees are prohibited. Result-based fees are only possible if they remain a complement to hourly-based fees.

### **Prohibition of punitive damages** (Para. 31)

Punitive damages are currently prohibited under French law.

### **Collective Follow- on actions** (Para 33-34)

Competition group actions are exclusively follow-on actions: they are authorised only after a final decision from the National Competition Authority, the European Commission or a court which has identified anticompetitive behaviour.

### **Interplay between injunctions and compensation across all sectors**

Compensatory and injunctive reliefs in one single action can only be sought for discrimination and environment violations.



In consumer, competition and health law, only compensation can be sought with a group action. However, a cessation of the breach can be obtained through the use of interim measure justified by an imminent harm, or to stop a manifestly illegal act.

# FRANCE – REPORT

## I. General Collective Redress Mechanism

The *action de groupe* is not set up as a horizontal collective redress mechanism. It is provided for as a specific mechanism in the various sectors mentioned above, and there is no over-arching, generic, procedure applying to all sectors. Instead, over a period of time, legislation has been enacted in an ad-hoc manner so as to allow for collective redress mechanisms in different sectors. It is however to be noted that under recently enacted legislation, a common set of procedural rules have been adopted under the Law on the modernisation of 21<sup>st</sup> Century Justice of 12 October 2016, which establishes a common set of rules applying to the various sectoral-based collective redress mechanism, except for the consumer cases, which remain subject to specific rules deriving from the 2014 Hamon Law. Even under those cases falling under the 2016 Law are subject to certain different rules : for instance, in case of the collective redress mechanism for breach of data protection rules, only injunctive remedy is available and not damages (see below). The Collective Redress mechanism in France still remains a sectoral-based asymmetrical procedure.

## II. Sectoral Collective Redress Mechanisms

### A. Group Actions in Consumer Law

A collective redress procedure for consumer claims was duly introduced in 2014 by virtue of the Act reforming consumer law (Loi n°2014-344 du 17 mars 2014 sur la consommation, also known as *Loi Hamon*). Class action proceedings in consumer law are now governed by Articles L.423-1 to L.423-16 and R. 423-1 to R.423-23 of Consumer Code (*Code de la consommation*).

#### 1. Scope

Compensatory.

Pursuant to Article L.423-1 of Consumer Code, an accredited consumer association which is representative at the national level can claim compensation before a civil court for individual damage suffered by consumers placed in similar or identical situations. The *action de groupe* is available where several consumers placed in similar or identical situations claim compensation for material damage resulting from a breach of statutory or contractual obligations committed by the defendants.

#### 2. Procedural Framework

##### a. Competent Court

The *tribunal de grande instance* has exclusive jurisdiction over collective proceedings. In accordance with French civil procedure rules, the competent court is the court of the place where the defendant lives. If this location is outside France, the *Tribunal de grande instance de Paris* is exclusively competent.

##### b. Standing

Only associations have legal standing to bring collective actions.

Associations must:

- be representative at a national level
- must comply with the following conditions set out in Article R.811-1 and seq. of the Consumer Code:
- at least one year of existence,
- evidence of effective and public activity with a view to the protection of consumer interests, and
- threshold of individual members.

To date, 15 associations have satisfied these criteria and are thus entitled to file collective proceedings.

### **c. Availability of Cross Border collective redress**

Currently no collective action involves foreign plaintiffs.

### **d. Opt-In / Opt-Out**

According to the French group action regime, which follows a multi-stage approach (see below), a group is constituted via an opt-in system after the decision on liability has been reached. Under the French class action regime, the group as such is only constituted after the decision on liability has been handed down, which determines the shape and the scope of the group. Since individual claimants can join the group only after this first phase, the likely success of their claims is clearer and they are ultimately less exposed to the risk associated with the litigation. Claimants are therefore incentivised to take part in the action.

### **e. Main procedural rules**

The general rules applicable to proceedings before the *Tribunal de grande instance* also apply to group action proceedings. This includes the mandatory requirement of representation by a lawyer and the case management by a specific judge (*juge de la mise en état*). Furthermore, ordinary French civil procedure rules apply.

A 'simplified collective action' (*action de groupe simplifiée*) is possible if claimants are identified and their damage is identical (Art. L623-14 Consumer Code). In these circumstances, the court can oblige the defendant to compensate claimants immediately and individually within a fixed period of time.

### **Evidence/ discovery**

There is no discovery procedure under French law and the ordinary rules of French civil procedure apply. The judge in charge (*juge de la mise en état*) oversees disclosure of evidence and can order the production and timely exchanges of documents between parties and the court (Arts. 763 and seq. Code of Civil Procedure). The court is empowered to order the preservation of evidence and the production of documents, including those held by the defendant. (Art. R623-9 Consumer Code)

### **Single or multi stage process**

The group action mechanism follows a three-step approach.

(1) *First phase*: the court decides on liability issues on the basis of test cases brought by the association(s). The court then circumscribes the scope of defendant(s) liability and clarifies the damage to be compensated. If liability

is established, judges shape the collective action: they determine the criteria that claimants must meet to be included in the group, specify the damage to be compensated and the available remedies, they fix cut-off dates to join the group, and set the conditions for its announcement via mass media. The decision on liability can be appealed.

(2) *Second phase*: the group is constituted via an opt-in system. Claimants must fulfil the criteria set out by the court. The judge may intervene should difficulties occur.

(3) *Third phase*: a final ruling from the court terminates the proceedings. If needed, the court may deal with remaining issues or obstacles linked to the distribution of compensation.

### **Settlement option**

Associations can settle the case on behalf of the claimants (Art. L623-22 and L623-23). Judicial approval is required for any out of court settlement agreement. The settlement agreement must specify the publicity process, the dates and the criteria for inclusion in the settlement and the court must verify that the settlement agreement correctly and sufficiently protects the claimants' interests.

## **3. Available Remedies**

Only compensatory relief is available. However, under art. L621-9 of the Consumer Code, the association can intervene and ask the Court to apply, where necessary, interim measures provided for in art. L. 621-2: if the Court recognises a violation, it can order a cessation of the breach, if necessary under penalty in the case of non-compliance.

Compensation is limited to material damage suffered by consumers. Physical or moral harm is not recoverable. Punitive damages are currently prohibited under French law.

The court has a key role in determining the nature of the compensation awarded. The ruling on liability sets out the nature of compensation and the conditions of its distribution. Compensation can be in kind or in money. Art. L. 623-6 of Consumer Code provides that whenever the court considers compensation in kind to be more appropriate, the court must specify its conditions.

Under the standard procedure, each consumer of the class is individually compensated: they must provide evidence that they suffered the damage defined by the judge, who will then individually set the amount to be recovered.

Under the simplified procedure, the individuals will have suffered identical losses and therefore receive the same amount of damages.

Associations can settle the case on behalf of the claimants (Art. L623-22 and L623-23). Judicial approval is required for any out of court settlement agreement.

## **4. Costs**

Legal costs (i.e. costs pertaining to proceedings, processes and enforcement procedures) are usually borne by the losing party (Arts. 695 and 696 of Code

of Civil Procedure) unless the judge, by a reasoned decision, imposes the whole or part of it on another party.

The court may also order the losing party to pay the winning party's lawyer's and/or expert's fees. In these circumstances, the judge may take into consideration the rules of equity and the financial condition of the party ordered to pay (Art. 700 of Code of Civil Procedure).

## **5. Lawyers' Fees**

Professional ethics rules apply to such fees. Contingency fees are prohibited under French law. Result-based fees are only possible, if they remain a complement to hourly-based fees. There is no judicial review of lawyers' fees.

## **6. Funding**

The court can direct the defendant to provide the claimant association(s) with advance payments in respect of costs and expenses arising out of constitution of the group (Art. L. 623-12 of Consumer Code). The exact amount is left to the court's discretion, but should reflect the nature and the complexity of the diligences borne by the association. The current regime does provide for public support of group action proceedings. There is no specific provision relating to third party funding. To date, the associations bringing the claims have been funding the actions.

## **7. Enforcement of collective actions/settlements**

The judge who ruled on liability also decides on difficulties which might arise during the implementation stage of the judgment (art. L623-19 of the French Consumer Code). He shall fix a period of time within which he can be seized of claims regarding the distribution of compensation the professional has not complied with (art. L623-11). Under Article R623-28 of the French Consumer Code, the association is deemed to be a creditor and, as such, can benefit from articles L. 111-1 and L. 111-2 of the French Code of Civil Procedure for the enforcement of judgments: interim and conservatory measures are available to compel the defaulting debtor to perform its obligation.

## **8. Number and types of cases brought/pending**

Between October 2014 and December 2016, nine claims have been brought by associations. Eight of them are currently pending, and one was settled.

- Three relating to housing (one settlement)
- Three relating to financial investment
- One relating to electronic communications
- One relating to tourism
- One relating to the economic sphere

## 9. Impact of the Recommendation/Problems and Critiques

- Change in traditional case management rules: The management of information flows about the proceedings requires the court to consider publicity and dissemination of information about collective cases.
- Publicity campaigns undertaken by parties: it appears that associations have accompanied their filings with intensive outreach campaigns launched at the very first stage of the action. This creates reputational costs for companies. In reply, companies develop their own information strategies targeting individuals.
- A recurring criticism is the complexity of the procedure.<sup>303</sup> Another is that it places a very heavy administrative and financial burden on consumer associations, which often do not have extensive resources..
- Lawyer-driven litigation: Some initiatives have encouraged the launch of web platforms aiming at informing individuals and at collecting complaints against companies (see for instance the site: [www.actioncivile.com](http://www.actioncivile.com)).

## 10. Information on Collective Redress

During the first stage of a collective action, the court decides on the publicity measures to be taken in order to inform the relevant consumers. The publicity measures can only be implemented after a final decision on admissibility of the claim. The costs of the publication measures are born by the defendant.

## 11. Case summaries

<b>Housing</b>	<i>Association UFC Que Choisir v. Foncia</i> (October 2014):	Filed on 1 October 2014, this case is the first group action lawsuit. It was filed before the Nanterre court and regards undue fees paid by 318, 000 tenants. The filing association has estimated the annual average loss to be around 27.60 Euros per claimant. In some cases, the losses have extended over several years and reached hundreds of Euros. The association has evaluated Foncia's illegal benefit to be around 40 Million Euros over five years. Aware that the success or the failure of this first groupCivic action would have consequences on future group actions, UFC Que Choisir seems to have carefully selected its first case since Foncia had already been fined by the Paris High Court of First Instance	The decision on the admissibility of this claim is currently pending.
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<sup>303</sup> See N. Molfessis, "L'exorbitance de l'action de groupe à la française", *Recueil Dalloz*, 2014, p. 947.

		in 2013 for comparable practices.	
	<i>Association Confédération Syndicale des Familles (SLC-CSF) v. Paris Habitat-OPH</i> (October 2014):	This group action was filed before the Paris court, and regards undue fees paid by tenants. According to the association, the class action concerns about 100,000 tenants. Even though the individual harm would be relatively small, the aggregated loss is estimated to be 3 Million Euros.	In May 2015, the parties reached a settlement agreement, and Paris Habitat agreed to pay 2 Million Euros to compensate 100,000 tenants.
	<i>Association Confédération Nationale du Logement (CNL) v. Immobilière 3F</i> (November 2014) :	The group action concerns unfair contract terms contained in property lease contracts with the company Immobilière 3F.	On January 27th, 2016, the Tribunal de Grande Instance of Paris dismissed the claim, pointing out CNL's failure to provide adequate proof of the lack of reimbursement. The Tribunal also did not recognize the unfair nature of the clause. An appeal has been lodged by the association (CNL).
<b>Financial investment</b>	<i>Association CLCV v. Axa and AGIPI</i> (October 2014):	This group action was filed before the Nanterre court, and targets Axa and AGIPI for breach of their contractual obligations with regards to contracts signed before 1995 which guaranteed a 4.5% minimum remuneration rate. According to CLCV, the aggregate loss would reach between 300 and 500 Million Euros, and the loss per individual claimant would be estimated to be 1,500-4,000 Euros (with a possibility of greater losses which, in specific cases, could reach 15,000 Euros).	The decision on the admissibility of this claim is currently pending.
	<i>UFC-Que Choisir v. BNP Paribas</i> (July 2016):	BNP Paribas allegedly breached its contractual duties, promising an increase of the capital contributed to an investment fund.	The decision on the admissibility of this claim is currently pending.
	<i>CLCV v. BNP Paribas</i>	This subsidiary of BNP Paribas marketed a mortgage that proved	The decision on the admissibility of

	<i>Personal Finance</i> (BNP PPF) (November 2016):	highly detrimental to the individuals who subscribed to it.	this claim is currently pending.
<b>Consumer</b>	<i>Association Familles Rurales v. SFR</i> (May 2015):	This group action concerns alleged misleading information displayed by the mobile telecommunications company SFR on its 4G internet coverage.	The decision on the admissibility of this claim is currently pending.
<b>Consumer</b>	<i>CLCV v. BMW Motorrad France</i> (December 2015):	Consumers were allegedly unfairly compensated by BMW Motorrad, a motorbike manufacturer, following defects in the conception of a vehicle.	The decision on the admissibility of this claim is currently pending.
<b>Tourism</b>	<i>Familles rurales v. Manoir de Ker an Poul</i> (August 2015):	The camping site Manoir de Ker an Poul allegedly included an unfair clause in its lease contracts, to expel all mobile homes after a certain time.	In December 2016, the claim was recognized admissible. The decision of the merits is currently pending.

## B. Group Actions in Competition Law

### 1. Differences with consumer law group action

In competition law claims, Arts. L.623-24 to L.623-26 of Consumer Code specify two additional requirements to the procedure outlined above under III:

**Competition group actions are exclusively follow-on actions:** they are authorised only after a final decision from the National Competition Authority, the European Commission or a court which has identified anticompetitive behaviour. The court does not decide on liability issues, but focusses on the determination of the group, on the fixing of membership criteria, on the evaluation of recoverable loss per claimants, and on the publicity process.

**Limitation:** Group actions can only be commenced within a period of 5 years after the final decision establishing the infringement to competition rules has been made.

### 2. Impact of the Recommendation/Problems and Critiques

- Evaluation of individual damage and fixing of a damages schedule: Legal uncertainty in the fixing of a damages schedule remains where several defendants have been involved in anticompetitive practice.
- Leniency programs and their impact upon compensatory damages claims is to be determined.



## C. Group Actions in Health Law

### 1. Procedural Framework

Law No. 2016-41 of 26 January 2016 and Arts. L.1143-1 and seq. of the French Code of Public Health introduced rules for group actions in the health sector.

Accredited users' or patients' associations can file for compensation in respect of individual damage suffered by users of the health system who are placed in similar or identical situations. The loss must result from a breach of statutory or contractual obligations committed by the manufacturers or suppliers of health products. The group action covers damages claims arising out of personal injuries suffered by users of the health system.

#### Single or multi stage process

Proceedings follow the three-step procedure outlined under III. However, mediation may be ordered upon party request. Mediators are appointed by the court and selected from a list of established by the Ministry of Health. The mediator can be assisted by a mediation committee. Together, they are in charge of proposing a settlement agreement to parties.

In the absence of mediation, the court rules on liability, the constitution of the group, recoverable harm and remedies. The court may set down cut-off dates for joining the group. The period given to claimants to join the group may extend between 6 months and 5 years.

The decree implementing the Act of November 2016 allows claims for damages which are predating the entry into force of the Act.

### 2. Case summaries

<i>Association d'aide aux parents d'enfants souffrant du syndrome de l'anti-convulsivant (APESAC) v Sanofi</i>	A drug developed by Sanofi allegedly caused malformations to the new-borns of drug users	Both parties are currently in the out-of-court "amicable" phase until April 2017, when APESAC will be allowed to file a claim before the Tribunal de Grande Instance of Paris.
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### 3. Impact of the Recommendation/Problems and Critiques

- Length of proceedings: Length of proceedings increased since claimants may have up to five years to join the group.
- Complexity of procedure: The impact of diverse harms and the approach to the allocation of damages within the group is yet to be determined.
- Increased administrative burden: the burden of proof for healthcare professionals increases as they must now take into account retrospective scope of claims and keep a flawless traceability of their activity.

## **D. Group Actions in Discrimination Cases**

### **1. Procedural Framework**

Group actions in this area were established pursuant to Act of November 2016 (Loi n° 2016-1547 du 18 novembre 2016).

#### **a. Competent Court**

The claim may be brought before the *Tribunal de grande instance* or the administrative court.

#### **b. Standing**

Associations which have the objective of fighting discrimination (as well as trade unions) may bring proceedings to claim compensation for the losses suffered by persons placed in similar or identical situations due to direct or indirect discrimination.

#### **c. Main procedural rules**

Proceedings follow the three-step procedure outlined under III. During the first phase of the procedure, the association/trade union must provide evidence of discriminatory practices before the court. On the basis of the test cases brought by the plaintiff, the court will decide on the defendant's liability.

The legislation also provides for a simplified group action (*action de groupe simplifiée*) in situations where individuals are known and have suffered identical losses.

Mediation is also possible and any settlement agreement must receive judicial approval. Individuals must voluntarily step forward to benefit from the terms and conditions of the settlement agreement.

### **2. Available Remedies**

The court can order injunctive relief and may also order the defendant to pay a fixed sum in advance to cover the claimant's expenses

## **E. Group Actions in Environmental Law**

Environmental class actions are now incorporated in the French Environment Code, and aim at compensating the losses caused by a damage in the areas mentioned in Article L. 142-2 of the French Environment Code (amongst them: nature, environment, improvement in the living environment, water protection, urbanism, contamination, nuclear safety, or radiation protection).

### **1. Procedural Framework**

Group actions are available pursuant to the Act of November 18th, 2016. The procedural framework is similar to the one described in 'Discrimination'. Only a violation of environmental law committed after the entry into force of the law can be subject to a group action.

## **Standing**

As provided by Article L. 142-3-1, the organizations allowed to initiate such actions must be duly registered with for statutory aim to protect the environment, or to defend victims suffering physical injuries, or to defend the financial interests of their members.

## **2. Available Remedies**

Both injunctive and compensatory relief is available.

In all sectors except data protection, the class action enables to obtain both cessation of the breach and compensation for the bodily injuries and material losses resulting from the damage.

Regarding specifically environmental damage, only the losses sustained by individuals or legal entities that result from the damage caused to the environment are compensable

## **F. Group Actions in Data Protection Law**

### **1. Procedural Framework**

Group actions are available pursuant the Act of November 2016. Since, data privacy class actions are incorporated in the French Data Protection Act (Art. 43 ter of Law no. 78-17 of 6 January 1978 on information technology, data files and liberties (Loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés)).

The procedural framework is similar to the one described in 'Discrimination'.

In this procedure, there is no formation of a group of victims, thus the mechanism is different from the group action procedure as described above.

### **Standing**

The action can only be brought by organizations on behalf of individuals who are in a similar situation, all suffering a loss caused by a violation of the French Data Protection Act. The organization representing the individuals must have at least five years of existence, with a purpose to protect privacy and personal data.

### **2. Available Remedies**

Injunctive relief only.

# GERMANY – FACTSHEET

## Scope

There is no horizontal mechanism, but traditional rules on multiparty proceedings (joinder of parties, joinder of claims and stay of proceedings) can be applied across sectors.

For high value antitrust damages claims, an approach followed was a collection of claims via assignment by a single entity that brought the claim. To date there are formal hurdles to this approach.

In the areas of consumer law and unfair competition: injunctions or skimming off of profits are used to protect collective interests.

For investor claims, compensatory test case proceedings were introduced (KapMuG). The decision on liability has binding effect for plurality of individual claims which are stayed until test case is decided.

## Problems/Incompatibilities with the Recommendation

No coherent horizontal regime

## Standing

### Competition and consumer law

Consumer or business associations, authorities

### KapMuG

Lead plaintiff

### Assignment model

Assignee of the claims

## Admissibility

In KapMuG cases, a minimum participation of 10 plaintiffs is required to get test case proceedings started.

## Information on Collective Redress

Information on test case proceedings is published to inform potential test case claimants.

## Funding

Third party funding is available and funders are used in practice. Being a rather new phenomenon, the area remains as yet without specific regulation.

## Cross Border Cases

In principle foreign claimants can participate both in injunctive proceedings in consumer-competition law and in KapMuG cases.

## Expedient procedures for injunctive orders

Yes (consumer and competition law).

### **Problems/Incompatibilities with Recommendation principles**

Lack of financial incentives for associations can hinder use of proceedings.

### **Efficient enforcement of injunctive orders**

Yes. Sanctions under civil procedure rules apply in case of non compliance.

### **Opt In/Opt Out**

In KapMuG cases, the approach is similar to opt-in. In addition, opt-out settlements are permitted. As these occur during KapMuG proceedings, the opt-out follows an earlier "opt-in" and does therefore not cause any common concerns related with opt-out proceedings.

### **Collective ADR and Settlements**

Parties are encouraged to settle compensation disputes consensually under KapMuG. Special settlement provisions were introduced in 2012.

### **Collective Follow-on Actions**

Compensatory collective redress is not dependent on a prior injunction. In investor claims under the KapMuG, proceedings end with a declaratory decision on liability which is binding for individual follow-on actions.

### **Interplay between injunctions and compensation across all sectors**

Usually the question does not arise, as consumer redress is mostly limited to injunctions and investor claims are declaratory test case proceedings followed by individual damages claims, ie proceedings aim at compensation from the outset. In the latter case, there is an interplay between test case findings and individual damages claims.

# GERMANY - REPORT

## I. General Collective Redress Mechanism

A general collective redress mechanism is not available in German law. 'Traditional' civil procedure rules on joinder or consolidation of claims and stay of proceedings are not tailored to mass claims and lack efficiency. A method to pool claims that has been tested in practice is the assignment of similar claims against the same defendant to a specific body that brings a lawsuit based on the bundled claims. While this method has been used in a high value antitrust case it is not per se limited to a specific sector.

### 1. Joinder, stay, consolidation

A joinder of claims (Sec. 59 ff ZPO, Streitgenossenschaft) can allow several parties to bring a claim against the same defendant, but the rules as they stand do not guarantee uniform treatment of all claims (Sec. 61 ZPO). Suits remain de facto individual actions with their own individual chances of success or failure. Only a necessary joinder (notwendige Streitgenossenschaft, Sec. 62) can link lawsuits in a way in which absent parties are deemed to be represented by co-litigants and bound by their declarations. This however presupposes that the legal relationship at the centre of the litigation can only be established uniformly vis-à-vis all joined parties (eg. joint tenants, or heir and administrator) which is not the case in typical mass claims scenarios. Similar considerations apply to third party intervention in support of litigants (Sec. 66 – Nebenintervention). A stay or joinder of proceedings on the initiative of the court (Sec. 147 and 148 ZPO) can be helpful in organising a plurality of claims but these rules alone don't do justice to the needs of mass claims. None of the classical mechanisms fits their specific requirements.

### 2. Assignment of Claims

A method to concentrate claims is founding an association or company/SPV to which claims of a plurality of parties are assigned and which is acting in court on their behalf. This enables a suit to be brought by a single body, assignee of all claims. Under German law, this assignment model needs to comply with various requirements, eg. of the Legal Services Act<sup>304</sup>, the Code of Civil Procedure as well as with company law.

Cartel Damage Claims S.A. (CDC) has brought claims in a selection of jurisdictions, ia. in Germany, as assignee of antitrust damages claims from a variety of businesses which had contracted with cement producers forming a cartel. Although this model can work in principle, the action failed in the concrete case: The court refused to grant CDC standing considering the assignments invalid due to a lack of authorisation under the Legal Services Act. Despite subsequently repeating the assignments observing all requirements, the next instance<sup>305</sup> dismissed the claim due to a lack of upfront guarantee to cover procedural costs. Coverage of all adverse costs

<sup>304</sup> Act on Legal Services (*Rechtsdienstleistungsgesetz* (RDG)) of 12. December 2007 (BGBl. I p. 2840), last amendment 1 October 2013 (BGBl. I p. 3714).

<sup>305</sup> OLG Düsseldorf 18. Februar 2015 (Az. VI U 3/14), LG Düsseldorf, 17. Dezember 2013 (Az. 37 O 200/09).

needs to be given at the time of the assignments. This model has procedural and economic advantages where no other mechanism is viable, but has not (yet) been successful in Germany.<sup>306</sup> Courts in the Netherlands and Finland have been more pragmatic and not dismissed such actions.

### **3. Test Case Agreements**

Agreeing on test case proceedings (Musterklagevereinbarung) could theoretically be a potential way for plaintiffs to concentrate claims with similar issues of law and fact, but there is no broader general legal framework for such approach outside the KapMuG. Test case proceedings would only be brought by consumer associations to create a precedent, but as yet without real binding effect on other cases. Whilst a legislative proposal has been made to extend the KapMuG test case proceedings and create a general collective redress mechanism based on this model, no concrete results have yet been achieved.

## **II. Sectoral Collective Redress Mechanisms**

### **A. Consumer and Competition Law**

In consumer law representative actions brought by associations can provide a form of collective redress, mainly seeking injunctions on behalf of consumers: see the Act on Unfair Competition (UWG)<sup>307</sup>, the Act on Injunctive Relief for consumer rights and other violations (UKlaG)<sup>308</sup> and Sec. 79 (2) Nr. 3 ZPO.<sup>309</sup> Claims under the UKlaG and suits under Sec. 8 UWG are frequent actions.

#### **1. Representative Actions under the Act on Injunctive Relief (UKlaG)**

##### **a. Scope**

Representative actions under the UKlaG aim at injunctive relief and at the elimination of the sources for a violation of consumer rights. Defendants are businesses using unfair commercial terms (Sec. 1 UKlaG) or businesses using other practices violating consumer law (Sec. 2 UKlaG).

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<sup>306</sup> See LG Düsseldorf, 9.3.2006, 34 O 147/05, BB 2007, 847 ff. and the subsequent decisions LG Düsseldorf, 21.02.2007 - 34 O (Kart) 147/05; LG Düsseldorf, 21.02.2007 - 34 O 147/05; LG Düsseldorf, 21.02.2007 - 34 O Kart 147/05; OLG Düsseldorf, 14.05.2008 - U (Kart) 14/07; OLG Düsseldorf, 14.05.2008 - VI U Kart 14/07; BGH, 07.04.2009 - KZR 42/08.

<sup>307</sup> Act on Unfair Competition (*Gesetz gegen den Unlauteren Wettbewerb* (UWG)) in its version of 3 March 2010 (BGBl. I p. 254), last amendment 1 October 2013 (BGBl. I p. 3714).

<sup>308</sup> Act on Injunctive Relief for consumer rights and other violations (*Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen* (Unterlassungsklagengesetz - UKlaG)).

<sup>309</sup> Code of Civil Procedure (*Zivilprozessordnung* (ZPO)).

## **b. Standing**

Consumers themselves are not parties to the proceedings. They can only be brought by:

(1) associations 'promoting commercial or independent professional interests'. Among its members must be a considerable number of entrepreneurs active in the same market, they need to effectively promote commercial or independent professional interests and the contravention needs to affect the interests of their members.

(2) qualified listed entities (Sec. 4 UKlaG: established consumer associations fulfilling certain criteria as to the seriousness with which they pursue consumer interests; it is presumed that consumer advice centres and publicly funded consumer associations fulfil these criteria); and

(3) Chambers of Industry and Commerce.

## **c. Procedure**

The Regional Court (*Landgericht*) in the area in which the defendant has his place of business/ place of residence is competent to hear UKlaG proceedings. To facilitate redress, Sec. 6(2) UKlaG enables under certain circumstances a concentration of claims in one Regional Court.

There are no specific certification criteria.

UKlaG proceedings follow Sec. 12 of the Act on Unfair Competition (UWG) and the general procedural rules in the Code of Civil Procedure (ZPO). The debtor should be notified prior to the initiation of court proceedings and obtain the opportunity to resolve the dispute out of court by making a cease and desist declaration under a penalty. Provisional injunctions can be granted under simplified conditions.

If it has been established that a business used unfair commercial terms (Sec. 1 UKlaG), the relevant terms are deemed to be invalid also in relation to other consumers bringing individual actions against this business, provided they invoke the injunction of the court.

## **d. Participation of Foreign Plaintiffs**

Sec. 4a UKlaG allows the participation of foreign associations as it extends to intra-EU violations of consumer rights.

## **e. Available Remedies**

Only injunctive relief is available.

## **f. Costs and Funding**

The loser pays rule applies. However, costs need to be paid in advance. According to Sec. 12 (4) the pecuniary value of the claims for injunctive relief pursuant to Sec. 8 (1) can be reduced under certain circumstances to limit total costs. This occurs in practice, as such actions are an important financial burden and risk for associations.

## **2. Actions on Behalf of the Consumers (*Sammelklagen*)**

Sec. 79 (2) Nr. 3 of the Code of Civil Procedure (ZPO) allows consumer associations to pool claims of consumers by collecting several claims or to



bring a single consumer case to the court as a sort of test case. The meaning of consumer law is broader than in UKlaG cases and can eg. comprise product liability incidents. In practice, associations rather bring single test cases for consumers. Collective actions based on a plurality of collected claims are subject to administrative hurdles and costs.

**a. Standing**

Sec. 79 (2) Nr. 3 ZPO grants standing to consumer advice centres and other publicly funded consumer associations.

**b. Procedure**

These proceedings are only viable for smaller groups of identifiable consumers. The method of pooling claims compares to the opt-in principle and proceedings follow general procedural rules. As the association bears the litigation costs, such actions can be a financial risk if a plurality of claims is brought.

**c. Remedies**

The actions can either aim at the recovery of damages, which, in case of success, are distributed amongst the affected consumers; or at specific performance.

**d. Problem**

Due to a lack of specific procedure for collective proceedings and a lack of financial incentives, such actions are not a viable option in practice.

**3. Representative Actions under the Unfair Competition Act (UWG)**

**a. Scope**

The UWG provides for injunctive relief, damages and skimming off actions in cases of unfair competition and inappropriate business tactics (Sec. 8-10 of the Unfair Competition Act (UWG)). These actions aim at controlling market behaviour of businesses. Sec. 4 ff UWG lists and defines unfair commercial practices (e.g. practices suited to impairing the freedom of decision of consumers or other market participants through applying pressure; or practices suited to exploitation of a consumers mental or physical infirmity, age, commercial inexperience, credulity or fear; or the constraint to which the consumer is subject.)

Remedies are: injunctive relief according to Sec. 8 UWG against businesses using illegal commercial practices; damages (sec. 9); and skimming off of profits of businesses intentionally violating the UWG (sec. 10).

**b. Standing**

Injunctive relief under Sec. 8 can be sought by (a) associations representing interests of businesses provided that they fulfil certain criteria; by (b) qualified listed entities (see associations having standing under Art. 4(3) Dir 2009/22/EC); (c) by Chambers of Industry and Commerce; and, importantly, (d) by competitors.

Damages (Sec. 9 UWG) can only be claimed by competitors.

A Sec. 10 suit can be brought by all those having standing in injunctive relief cases, except for competitors.

### **c. Procedure**

Actions under Art. 8 and 10 are representative actions that do not aim at compensating the victims of unfair competition but at skimming off the profits from the unfair trader. The profits then go to the Treasury. Such action cannot be classified within the categories of opt-in or opt-out.

Regional Courts (Landgerichte) have exclusive jurisdiction. Local jurisdiction lies with the court in whose district the defendant has his place of business/ place of residence, or, under certain circumstances, with the court in whose district the act was committed (Sec. 14 UWG).

The procedure follows the general rules in the Code of Civil Procedure plus specific requirements as listed in Sec. 12 UWG. Parties entitled to injunctive relief should notify the debtor prior to initiating court proceedings and give him the opportunity to resolve the dispute by making a cease and desist declaration under a penalty. Provisional injunctions can be granted under simplified conditions.

### **d. Participation of Foreign Plaintiffs**

In principle, foreign consumer associations can participate in a representative action brought in Germany, see Sec. 8(3) UWG.

### **e. Available Remedies**

Available remedies depend on the type of action brought:

- (1) injunctive relief (Sec. 8 UWG) against businesses using illegal commercial practices;
- (2) damages (Sec. 9);
- (3) skimming off of profits of businesses intentionally violating the UWG (Sec. 10).

### **f. Costs and Funding**

The loser pays rule applies. According to Sec. 12 (4) UWG, the pecuniary value of the claims for injunctive relief pursuant to Sec. 8 (1) UWG can be reduced under certain circumstances to limit total costs. As to Sec. 10 UWG claims<sup>310</sup>, there have been suggestions to amend the current regime. Due to the risk of losing the action and bearing the costs, and due to the fact that illegal profits go to the Treasury in case of a successful action, this type of redress is rarely sought.<sup>311</sup> Reportedly, reforms are envisaged, which could include the creation of a fund into which skimmed off profits can be paid and which can potentially be used for future actions in favour of consumers.

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<sup>310</sup> Actions under Sec. 8 UWG are frequent. On the contrary, only one case seems to have been brought under Sec. 10 as it is difficult to determine the amount of profits made through the use of unfair commercial practices. See eg. OLG Frankfurt, 20.5.2010, 6 U 33/09. MMR 2010, 614 ff.

<sup>311</sup> It has therefore been suggested to grant a pro rata participation in the skimmed-off profits limited by an absolute cap (e.g. a 50 % participation with a cap of 10 Million Euro). See Wagner, G, Neue Perspektiven im Schadensersatzrecht - Kommerzialisierung, Strafschadensersatz, Kollektivschaden, Gutachten A für den 66. Deutschen Juristentag (Munich 2006), p. 112; Möllers, T./ Pregler, B., Civil Law Enforcement, Unfair Commercial Practices Directive and Collective Redress in Economic Law, Jus Civile 2013, p. 374, 375.

## **4. Actions under the Antitrust Act (*Gesetz gegen Wettbewerbsbeschränkungen - GWB*)**

### **a. Scope**

In Art. 101 or 102 TFEU infringement cases Sec. 33 GWB permits private actions (injunctive relief and damages claims). Sec. 34 and 34a GWB allow skimming off the defendant's profits, which go to the Treasury. There is no specific collective action (brought by competitors or other market participants) but such action is not excluded: Sec. 88 GWB allows a consolidation of actions if they have a legal or direct economic link, even in cases of exclusive jurisdiction. Sec. 33 (4) GWB secures a common basis for a plurality of claims (binding decision of a competition authority or the Commission for private follow-on actions). Recently, collective antitrust damages actions have (unsuccessfully) been brought by CDC via a different method: victims assigned their claims to CDC.<sup>312</sup> The assignment model was considered a more viable option for damages claims but failed for rather formal reasons (see above) under I.

### **b. Standing**

Actions can be brought by the victims of antitrust infringements (competitors/ other market participants); by associations promoting commercial or of independent professional interests; or by consumer advice centres and publicly funded consumer organisations.

### **c. Procedure**

Where associations bring claims on behalf of the competitors or other market participants, the latter have to actively agree to the case being brought to court. The Regional Courts (Landgerichte) have exclusive jurisdiction (Sec. 87 GWB).

## **B. Investor claims - Capital Market Model Claims Act (*Kapitalanleger-Musterverfahrensgesetz, KapMuG*)<sup>313</sup>**

Triggered by the Telekom case<sup>314</sup> (17000 investors brought claims against the Deutsche Telekom), the Capital Markets Test Case Act (*Kapitalanleger-Musterverfahrensgesetz, KapMuG*) has been created in 2005. The Act was recast in 2012, ia. to include opt-out settlement proceedings.

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<sup>312</sup> See the Cement Cartel Case in which CDC lead the proceedings for 28 victims of a cement cartel: LG Düsseldorf, 9.3.2006, 34 O 147/05, BB 2007, 847 ff. and the subsequent decisions LG Düsseldorf, 21.02.2007 - 34 O (Kart) 147/05; LG Düsseldorf, 21.02.2007 - 34 O 147/05; LG Düsseldorf, 21.02.2007 - 34 O Kart 147/05; OLG Düsseldorf, 14.05.2008 - U (Kart) 14/07; OLG Düsseldorf, 14.05.2008 - VI U Kart 14/07; BGH, 07.04.2009 - KZR 42/08.

<sup>313</sup> Capital Market Model Claims Act (*Kapitalanlegermusterverfahrensgesetz - KapMuG*), 19. Oktober 2012 (BGBl. I p. 2182), last amendment 23 June 2017 (BGBl. I p. 1693).

<sup>314</sup> The trial has been decided by the Higher Regional Court (OLG) Frankfurt on 16 May 2012 and is currently pending at the Federal Court of Justice (BGH), XI ZB 12/12; see also ZIP 2012, 1236.

## 1. Scope

The KapMuG establishes binding test case proceedings for damages caused by wrong, deceptive or omitted public capital market information or by the use of such information.<sup>315</sup> The request for test case proceedings clarifies which issues of law and fact are the object of the proceedings (Sec. 2), although the scope can be extended upon request of one of the parties.<sup>316</sup> A declaratory judgment in the test case proceedings establishes the defendant's liability with binding effect on the individual damages claims of all investors.

## 2. Standing

Investors and the defendant can request test case proceedings, provided that a minimum of ten plaintiffs join. If this occurs, individual lawsuits are stayed until the test case is decided. The court selects a lead plaintiff in its discretion (Sec. 9 (2) KapMuG), considering the plaintiff's suitability and the value of his claim. The lead plaintiff is not a representative of the group of harmed investors, but the latter are interested parties in the test case, with the right to intervene (eg for the submission of evidence).

## 3. Procedure

### a. Competent Court

The Code of Civil procedure provides for exclusive jurisdiction in (single) investor cases<sup>317</sup>. The court seized publishes a request for test case proceedings if such request was made to clarify specific questions of law and fact (Sec. 6 KapMuG). If within four months a minimum of 9 similar claims are filed, the first court seized refers the matter to the Higher Regional Court (*Oberlandesgericht*), which starts and leads the test case proceedings. In parallel, all individual proceedings in the same matter are stayed - whether or not the parties have requested test case proceedings. The success of the individual claims depends on the result of the test case proceedings (sec. 8 KapMuG).

### b. Main Procedural Rules

The court determines the lead plaintiff in its discretion (Sec. 9 (2) KapMuG). All other parties will be intervening parties (Sec 9 (3) KapMuG). They have to accept the litigation in whatever situation it may be in at the time they intervene but are entitled to submit evidence, file motions etc., if this does not run counter the actions of the lead plaintiff (Sec. 14 KapMuG).

Sec. 10 (2) KapMuG allows investors to join test case proceedings within a period of six months after information on the test case proceedings has been published, even without yet filing an individual suit. The limitation period is interrupted once investors have filed a claim with the Higher Regional Court, provided that the test case proceedings concern the same facts, and that an individual suit is filed three months after the test case proceedings have been terminated.<sup>318</sup> Potential claimants can await the outcome of the test case

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<sup>315</sup> See Sec. 1 (2) KapMuG.

<sup>316</sup> See Sec. 15.

<sup>317</sup> Sec. 32b ZPO.

<sup>318</sup> Sec. 204 (1) Nr. 6a of the Civil Code (BGB).

proceedings before deciding upon an individual action. Once the 6 months deadline is expired, investors are precluded from KapMuG proceedings and have to pursue their own individual claim.

KapMuG proceedings either end by judgment (sec. 16) or settlement (Sec. 17 ff KapMuG). In a second phase, its result is used as a basis for the individual damages actions of all investors.

**c. Certification**

A minimum of 10 claimants is required to get test case proceedings started.

**d. Opt-in/ Opt-out Procedure**

KapMuG proceedings resemble opt-in proceedings, as claimants have to actively join the proceedings. Once a number of 10 claimants is achieved and proceedings commence, claimants who file a suit in the same matter against the same defendant are automatically included in the test case, but their identity is known from the outset. The result of the test case proceedings is binding on them.

The KapMuG settlement allows for a settlement, agreed upon between the lead plaintiff and the defendant. The settlement requires consent by 70 % of the claimants to have binding effect. The court has to approve the settlement. The procedure is an opt-out procedure - it binds all parties except those who have declared their opt-out. The opt-out system here operates differently from other regimes, as all claimants have been known from the beginning of the proceedings.

**e. Multi-Stage Process**

KapMuG proceedings are multi-stage proceedings: A first instance court needs to decide upon request that test case proceedings should be commenced at the Higher Regional Court. If approved, the original damages actions of the plaintiffs are stayed for the duration of the test case proceedings. The findings of the test case have binding effect on the individual actions. These are continued once the test case has been decided.

**f. Participation of Foreign Plaintiffs**

Provided that there is jurisdiction, participation of foreign plaintiffs is not per se excluded by the KapMuG.

**g. Expediency**

As the scope of the claim can be extended upon request of one of the parties,<sup>319</sup> supplementary motions can delay the proceedings substantially (see Telekom case).

**h. Res Judicata**

The decision in the test case is binding and forms the basis of the individual damages claims (Sec. 22 KapMuG). A settlement is binding on all parties who have not opted-out, provided the court has declared it valid (Sec. 23 KapMuG).

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<sup>319</sup> See Sec. 15.

## 4. Costs and Funding

The loser pays principle applies. The multi-step procedure renders the distribution of costs more complicated but also cheaper for each involved litigant: there is a pro rata distribution of costs for test case proceedings. They are considered as a part of the costs for the subsequent individual lawsuits and depend on their value (Sec. 24 KapMuG). In addition, costs for the individual proceedings (court fee and legal advice) have to be assumed.

## 5. Number of claims

Data on the number of claims suggests that since its creation, various cases have been brought under the KapMuG. From 2005 to 2009 studies refer to 24 cases.<sup>320</sup> Official statistics that include KapMuG cases since 2010 refer to 56 cases in 2010. (In 2011: 8 cases, in 2012: 18 cases, in 2013: 89 cases). In 2014 the number rose to 124. In 2015, 22 were pending before the Higher Regional Court.<sup>321</sup>

## C. Other areas

In other areas a proper mechanism is not available. However, exclusive jurisdiction for civil liability in mass environmental damage cases (Sec. 32a ZPO) enables a concentration of jurisdiction. Suits against the operator of a facility in view of compensating damages to the environment<sup>322</sup> have to be brought in the jurisdiction in which the facility causing the event giving rise to the damage is situated, except if the facility is situated abroad. Representative actions exist in the telecommunications sector,<sup>323</sup> where standing is granted to qualified entities and associations to claim injunctive relief. Representative actions also allow to secure equality for the disabled.<sup>324</sup>

In contrast, there is no broader rule for mass torts that guarantees a concentration of jurisdiction. Jurisdiction can lie with the courts at the place where the damage arises or where the event giving rise to the damage occurred or at the domicile of the defendant. There is no specific mechanism for collective mass tort claims, e.g. in the area of product liability. Whilst the provisions on social insurance<sup>325</sup> assure that claims of the victims for physical injury are satisfied by the insurance who then acts against the tortfeasor on the basis of subrogated claims, there is still a need for a proper collective redress mechanism covering economic losses and compensation for immaterial damage which are not covered by insurance.

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<sup>320</sup> Halfmeier/Rott/Feess, Ministry of Justice, KapMuG evaluation 2010.

<sup>321</sup> Statistisches Bundesamt, Fachserie 10, Reihe 2.1, 2010-2015 on proceedings under Sec. 6 KapMuG.

<sup>322</sup> See Annex 1 of the Act on Environmental Liability (*Umwelthaftungsgesetz* – UmweltHG).

<sup>323</sup> Sec. 44 of the Telecommunications Act (*Telekommunikationsgesetz* - TKG).

<sup>324</sup> Sec. 13 of the Act on Equality for the Disabled (*Behindertengleichstellungsgesetz* – BGG).

<sup>325</sup> Sec. 116 SGB X, Sec. 67 VVG.

## II. Information on Collective Redress

There is no national registry, but requests for test case proceedings have to be publicised and the court makes relevant documents available for participants in the proceedings.

## III. Case summaries of major cases

<p><b>CDC Antitrust Case – assignment</b></p> <p>OLG Düsseldorf 18. Februar 2015 (Az. VI U 3/14), LG Düsseldorf, 17. Dezember 2013 (Az. 37 O 200/09).</p>	<p>CDC initiated proceedings against a cement cartel as assignee of a bundle of individual damages claims. The claim was ultimately dismissed due to a lack of upfront guarantee by CDC to cover all adverse costs at the time of the assignments.</p>
<p><b>Deutsche Telekom Case - KapMuG</b></p> <p>(16.5.2012 23 Kap 1/06; 21.10.2014, BGH XI ZB 12/12)</p>	<p>17,000 investors claimed damages from Deutsche Telekom due to wrong information in the prospectus used by Telekom for their third initial public offering. Due to practical needs triggered by the sheer amount of claims, the KapMuG was introduced in 2005 by the legislator and the case was referred to the OLG Frankfurt under the new Act. In 2012, the case was dismissed but went to the BGH where it was held in 2014 that the prospectus was partially wrong and misleading. In 2016, the OLG Frankfurt decided in favour of the plaintiffs</p>
<p><b>Volkswagen Cases - KapMuG</b></p>	<p>Volkswagen shares dropped considerably in 2015 when the use of illegal devices to manipulate emissions became known. Several KapMuG actions have been initiated in Germany on behalf of VW investors.</p> <p>See eg Quinn Emanuel/ Bentham Europe, €700m claim: California State Teachers' Retirement System</p> <p>See eg. 3,25 billion claim of 277 institutional investors brought by Tilp, joining 170 private investors in the regional court in Braunschweig.</p>
<p><b>Corralcredit Bank AG – KapMuG</b></p> <p>(BGH II ZB 24/14)</p>	<p>KapMuG action based on failure to publish ad hoc announcements. Decision in favour of plaintiffs, appeal pending.</p>
<p><b>Hypo Real Estate - KapMuG</b></p> <p>(OLG Munich Kap</p>	<p>Failure to publish ad hoc announcements; misleading information about certificates held regarding the US subprime market</p> <p>Decision in favour of plaintiffs, appeal pending.</p>

3/10; BGH XI ZB 13/14)	
<p><b>Daimler Case - KapMuG</b></p> <p>(LG Stuttgart, 21 O 408/05; OLG Stuttgart 20 Kap1/08; BGH II ZB 7/09)</p>	<p>Failure to publish ad hoc announcement concerning the resignation of the chairman of the supervisory board. See also CJEU C-19/11. The action was dismissed by the OLG but was referred back already twice by the BGH.</p>
<p><b>Sec. 10 UWG cases</b></p> <p>(more than 12 since 2004)</p>	<p>Several cases have been brought concerning the skimming off of profits following unfair competitive behaviour, although such cases do not present any financial incentive for the associations bringing the claim as the profits go to the Treasury. See eg. District Court Bonn (12 O 33/05); District Court Munich I, 33 O 17282/07; and 37 O 16359/13 or District Court Hannover 18 O 36/15. Many of these cases were brought by the Vzbv, ie the federal consumer association.</p>



# GREECE – FACTSHEET

## **Scope**

No horizontal mechanism but joinder of parties, consolidation of proceedings available. A sectoral mechanism in consumer law is available and allows both **injunctive and limited compensatory** relief.

## **Problems/Incompatibilities with Recommendation principles**

Joinder does not ensure access to justice or fairness as multiple claimants are not treated as a single entity and joined claims remain ind. vis a vis the claimants.

Poor transparency of joinder proceedings: Defendant not aware of composition of group of claimants

## **Standing** (Para. 4-7)

### Representative Action

A representative action may be filed by a consumer association which fills specific criteria on number of membership and registration on Consumer Associations Reg. Associations need to satisfy the criteria of points (a) and (b) of para 4 of the Recommendation. Status of consumer associations is revoked if associations do not demonstrate any activity for two years or violate certain provisions of the Consumer Act.

## **Problems/Incompatibilities with Recommendation principles**

As regards point (c) of para 4 of the Recommendation, there are no requirements in respect to the entities' capacity in terms of financial and human resources, and legal expertise

## **Admissibility** (Para. 8-9)

Early determination of admissibility questions. Consumer claims brought for protection of consumer interest. General requirement of a legal interest

## **Information on Collective Redress** (Para. 10-12, 35-37)

Information available on collective redress actions via consumer association websites. National Registry not available.

## **Problems/Incompatibilities with Recommendation principles**

No registry

## **Funding** (Para. 14-16)

In claims brought by consumer associations: registration fees, contributions, income generated, public funds, non-pecuniary damages compensations. Private funding not allowed

## **Problems/Incompatibilities with Recommendation principles**

Registration fees are too low to generate sufficient funds to support representative action.

## **Cross Border Cases** (Para. 17-18)

National rules on admissibility or standing facilitate foreign claimant or foreign representative entity involvement

## **Expedient procedures for injunctive orders** (Para. 19)

Legislation requires courts in consumer representative claims to hear dispute at the 'earliest possible hearing date' (article 10(20) of the Consumer Act).

### **Efficient enforcement of injunctive orders** (Para. 20)

Art. 10(21) of the Law on Consumer Protection grants the Minister of Development the power to issue ministerial order obliging suppliers to adhere to a court decision. Sanctions for non-compliance with injunctive order possible (up to €100,000 for any violation).

The injunctive order may also impose detention up to one year against the in-compliant supplier. If the aforementioned penalties are not included in the injunctive order, application can be made to court of first instance.

### **Problems/Incompatibilities with Recommendation principles**

Ministerial order can subsequently be amended

No formal-judicial mechanism for monitoring compliance with an injunction order.

### **Opt In/Opt Out** (Para. 21-24)

Opt-out process. However, need for subsequent individual claims effectively results to functioning as opt-in process.

### **Problems/Incompatibilities with Recommendation principles**

Opt in unsuitable. Opt-out proceedings, are more apt to overcome both damage-quantification problems and rational apathy on the part of victims.

### **Collective ADR and Settlements** (Para. 25-28)

No provision for collective alternative dispute resolution but in practice a consumer protection association may attempt to mediate. Proposed solution not binding on parties.

### **Problems/Incompatibilities with Recommendation principles**

Settlements not examined by the courts.

Out of court settlements not common.

### **Costs** (Para. 13)

Loser pays principle applies, however the court has a wide discretion as to what is "reasonable"

### **Lawyers' Fees** (Para. 29-30)

Contingency fees allowed but it is not clear how contingency fees affect the incentive to litigate

### **Problems/Incompatibilities with Recommendation principles**

Abusive litigation and/or frivolous litigation can arise due to the way in which lawyers are remunerated on the basis of hourly rates, which is often the case when the defendant is a corporation.

Allowance of contingency fees

### **Prohibition of punitive damages** (Para. 31)

Non-pecuniary (moral) damages available in representative claims and must be used to further consumer protection purposes. Akin to punitive damages

### **Problems/Incompatibilities with Recommendation principles**

Availability of punitive damages.

### **Collective Follow- on actions** (Para 33-34)

Individual actions for damages start after final injunction order in consumer cases. Joinder mechanism used in such cases. Follow-on claims in competition rare due to length of proceedings.

### **Problems/Incompatibilities with Recommendation principles**

Procedure before Competition Commission (HCC) lengthy and subject to short limitation period. No suspension of limitation periods until the HCC reaches its decision.

### **Interplay between injunctions and compensation across all sectors**

Collective injunctive and compensatory actions (moral damages) can be brought within single proceedings in consumer cases. Individual consumers can bring subsequent individual claim for damages based on injunctive order.

# GREECE – REPORT

## I. General Collective Redress Mechanisms

Absent a general collective redress mechanism under Greek law, any collective claims which are joined pursuant to the mechanisms examined in this section, will follow the ordinary procedural rules of the CCP. The CPP does contain a series of provisions allowing the participation of more persons in the same trial. The most important of these provisions are those concerning the joinder of parties (articles 74-77).

### 1. Scope/Type

#### a. The 'Ordinary Joinder of Parties'

Under article 74 CCP, more persons can sue or be sued collectively when:

- They have a joint right or obligation in respect to the dispute at issue, or when their rights or obligations are based on the same factual or legal grounds; or
- The dispute concerns similar claims or obligations which are based on similar factual and legal grounds. In this case, the court must be competent to adjudicate the dispute for every defendant.

The 'ordinary joinder of parties' allows the joining of multiple parties in a common procedure, so as a single judgment can be issued vis-à-vis all the parties.<sup>326</sup> However, the existence of a single judgment does not necessarily imply that the content of the ruling will be the same for all parties. In the procedure, multiple individual suits are kept and are independent from each other.<sup>327</sup> This is reflected in the course of proceedings, as the CCP provides that the actions of one of the joined parties will neither benefit the other joined party nor place it at a disadvantage (article 75 CCP).<sup>328</sup> When the requirements of the ordinary joinder of parties are satisfied, the parties to a trial may choose to sue or be sued collectively through the ordinary joinder of parties, but there is no obligation thereto.<sup>329</sup>

#### b. 'Compulsory Joinder of Parties'

The other type of joinder of parties under the CCP is the so-called 'compulsory joinder of parties' (articles 76f CCP). In this case, the joinder of parties is necessary and not merely at the discretion of the parties. The joinder of parties is necessary when: a) the dispute can only be adjudicated uniformly vis-à-vis all the parties; b) the force of res judicata will extend to

<sup>326</sup> Ev Mpalogianni/M Georgiadou in Charoula Apalagaki (ed), *Code of Civil Procedure: Interpretation of the Articles* (3<sup>rd</sup> edn, Nomiki Vivliothiki 2016), art 74.

<sup>327</sup> Areios Pagos (Supreme Court) 505/2011 (NOMOS Legal Database); Ev Mpalogianni/M Georgiadou in Ch Apalagaki (ed), *Code of Civil Procedure: Interpretation of the Articles* (4<sup>rd</sup> edn, Nomiki Vivliothiki 2016), art 75 (in Greek)

<sup>328</sup> Ev Mpalogianni/M Georgiadou in Ch Apalagaki (ed), *Code of Civil Procedure: Interpretation of the Articles* (3<sup>rd</sup> edn, Nomiki Vivliothiki 2016), art 75.

<sup>329</sup> K Kerameys, D Kondylis and N Nikas (eds), *Interpretation of the Code of Civil Procedure* (Sakkoulas Publications Athens-Thessaloniki 2000) vol 1, art 74

other parties; c) a legal provision (procedural or substantive) requires the joint standing of the parties, failing which it shall be inadmissible and; d) there can be no contradictory judgments vis-à-vis the parties.

In the case of the compulsory joinder of parties, one or both sides to the dispute constitute a single entity comprising of multiple persons.<sup>330</sup> A number of exceptions to that rule are set out in article 76(2) CCP, which provides that the parties are not bound by the actions of their co-litigants as regards settlement, admission of the claim, withdrawal of litigation and agreement to resort to arbitration. Secondly, when a party to a compulsory joinder of parties challenges a court decision, the legal effect is extended to other co-litigants, who are considered to have also filed an appeal.<sup>331</sup>

### c. 'Third Party Intervention'

The CCP contains a chapter laying out rules for third party intervention (articles 79ff CCP). Greek Law distinguishes between two types of intervention:

- a) The first type, concerns a third party who asserts a claim to the object or the right of the proceedings pending between other persons (Article 79 CCP). The third party may only intervene in the first instance, pursuant to recent reforms introduced in civil procedure, as part of the ESM Programme for Greece.<sup>332</sup> This kind of intervention serves judicial economy and will not be explored further, as it is of little relevance for collective claims.
- b) The second type, provides for a third-party intervention in support of a party to pending proceedings (article 80 CCP). The CCP sets out specific conditions that need to be satisfied: the intervening party must be a third person to the dispute and have a legitimate interest in one party prevailing over the other. The third party may intervene at any stage of the legal dispute until a final judgment is issued. The intervening party does not acquire the status of plaintiff or defendant but is merely given the chance to support either party to the proceedings, in order to avoid potential negative consequences from the court's decision. That would be the case if a creditor in a mortgage loan would intervene in support of its debtor in a trial concerning the ownership of the secured property.<sup>333</sup> It is evident that the provision is ill-suited for collective claims.

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<sup>330</sup> K Beis, K Kalavros and S Stamatopoulos (eds), *Procedure Law of Private Disputes* (Ant N Sakkoulas 1999) 325

<sup>331</sup> Areios Pagos (Supreme Court, Plenary Session) 63/1981 (NOMOS Legal Database); Areios Pagos (Supreme Court) 770/2009 (NOMOS Legal Database); Areios Pagos (Supreme Court) 1130/2011 (NOMOS Legal Database); Areios Pagos (Supreme Court) 1681/2013 (NOMOS Legal Database); Areios Pagos (Supreme Court) 1382/2014 (NOMOS Legal Database); Areios Pagos (Supreme Court) 241/2015 (NOMOS Legal Database); Areios Pagos (Supreme Court) 855/2015 (NOMOS Legal Database)

<sup>332</sup> Law 4335/2015 (Government Gazette A/87 23 July 2015). See further Ev Mapalogianni/M Georgiadou in Charoula Apalagaki (ed.), *Code of Civil Procedure: Interpretation of the Articles* (3rd edn, Nomiki Vivliothiki 2016), art 79 (in Greek)

<sup>333</sup> K Kerameys/D Kondylis/ N Nikas (eds), *Interpretation of the Code of Civil Procedure* (Sakkoulas Publications Athens-Thessaloniki 2000) vol1, art 80 (in Greek); Ev Mapalogianni/M Georgiadou in Charoula Apalagaki (ed.), *Code of Civil Procedure: Interpretation of the Articles* (4th edn, Nomiki Vivliothiki 2016), art 80(in Greek)

#### **d. Consolidation**

Under Greek Law, individual claims can also be joined upon order of the courts, provided that the proceedings are subject to the same set of procedural rules (article 246 CCP). However, the separate claims retain their independence.<sup>334</sup> As a consequence, the court might issue a decision only for some of the consolidated claims and not for the others.<sup>335</sup>

Contrary to other legal orders, in Greece there is no mechanisms for screening inadmissible or unfounded claims prior to the hearing date. When a plaintiff submits a claim at the courts' secretariat, a hearing date is fixed in any case, even when the conditions for a claim are obviously not met. The assessment of whether the conditions for a claim are met, is a matter of judicial evaluation. As civil trials in Greece are completed after only one hearing session, the court will rule on the question of whether the conditions for a claim are met in its final decision, whilst also ruling on the substance of the case.

## **2. Impact of the Recommendation/Critiques**

There have been no concrete attempts for the introduction of a general collective redress mechanism, following the publication of the Commission Recommendation 2013/396/EU (hereafter 'Commission Recommendation'), as the Greek legislator does not seem to consider the introduction of collective redress mechanisms as a priority.

Although the compulsory joinder of parties seems *prima facie* suitable for collective redress, it will rarely be applicable in mass harm situations. The cases in which individual claims need to be joined necessarily are specific and are defined exhaustively in the CCP. Therefore, collective claims pursuant to mass harm situations will usually be brought under the procedural mechanism of the ordinary joinder of parties.

Under Greek law, collective claims pursuant to mass harm situations, within the meaning of the Commission Recommendation, will usually be brought under the procedural mechanism of the ordinary joinder of parties. This mechanism, however, cannot ensure access to justice and fairness of proceedings in accordance with the Commission Recommendation, in light of the fact that the multiple claimants are not treated as a single entity and their joined claims remain individual *vis-à-vis* each other.

In one case, a group of claimants brought forward an action, on the grounds of the alleged violation of the Directive 75/129/EEC regarding collective redundancies.<sup>336</sup> In that case, the multiple claims were joined under the provisions regarding the ordinary joinder of parties. This created significant procedural difficulties, as it meant that various court documents submitted by the defendant should be serviced to each one of the claimants, instead to a single (representative) entity. This requirement significantly raised the cost of litigation and consequently mitigated the chances for an out-of-court settlement, as the high costs borne by the defendant, effectively reduced the

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<sup>334</sup> Areios Pagos (Supreme Court) 1270/2015 (NOMOS Legal Database)

<sup>335</sup> Ch Triantafillidis/P Rentoulis in Ch Apalagaki (ed), Code of Civil Procedure: Interpretation of the Articles (3rd edn, Nomiki Vivliothiki 2016), art 246.

<sup>336</sup> In the context of this case, the CJEU issued a preliminary ruling, clarifying the applicable legal rules, see Joined cases C-187/05 to C-190/05 *Agorastoudis and Others* ECLI:EU:C:2006:535, [2006] I-07775

amount that could be paid in settlements. Furthermore, the applicable procedural rules on the ordinary joinder of parties, cannot ensure transparency of proceedings. Namely, the defendant might not be duly informed about the composition of the group of claimants and any changes therein, as the CCP does not contain any provisions requiring a group of claimants to provide relevant information to the defendant.

## II. Sectoral Collective Redress Mechanisms

The only genuine collective redress mechanism under Greek law, is provided in the area of Consumer Protection (Law 2251/1994). Consumer associations which fulfil certain criteria can bring representative actions, pursuing either injunctive collective redress or compensatory collective redress. There is no sectoral mechanism in place in the area of competition law. However, the broad wording of the provisions regarding consumer protection, makes it possible for a consumer association to bring a representative action against a producer or supplier who has violated competition law provisions, as the Consumer Act merely contains indicative examples of violations that may give rise to a representative action. In the field of Labour Law, the CCP contains provisions which allow the limited participation of trade unions to court proceedings in relation to labour disputes.

### A. Consumer Law

#### 1. Consumer Associations

Under Greek law, consumer associations may initiate court proceedings for the protection of consumers.<sup>337</sup> The establishment and function of consumer associations is regulated by the Law on Consumer protection and the provisions of the Greek Civil Code (GCC) regarding associations. According to the law, the sole purpose of consumer associations is the protection of consumers' rights and interests.<sup>338</sup>

The law does not provide a stipulation as to what rights and interests are deemed to be in need of protection by consumer associations. It is accepted that a wide scope of rights and interests fall within the purpose of consumer associations. However, these rights and interest must be genuinely 'collective', namely relating to the general interests of consumers as a group. This is evidenced by Article 10(16)(a) of the Consumer Act, which provides a

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<sup>337</sup> Law 2251/1994 (Government Gazette A/191 16 November 1994, as amended) (hereafter referred to as 'Law on Consumer Protection'). See also European Parliament: Directorate General For Internal Policies, 'Overview of existing collective redress schemes in EU Member States' <<http://www.europarl.europa.eu/document/activities/cont/201107/20110715ATT24242/20110715ATT24242EN.pdf>>. See also *D. Papadopoulou-Klamari/ Al Dimitra/Mikroulea Alexandra*, Private Enforcement and Collective Redress, FIDE XXVII, Congress Budapest, 2016 , Vol. 2 (Greece National Report), L Athanassiou , Collective Redress and Competition Policy, in A Nuyts and N. E. Hatzimihail (ed.), *Cross Border and Class Actions*, 2014, p. 145, *I Symplis*, Damages Actions, Greek Report, in B. Cortese (ed.), *EU Competition Law between public and private enforcement*, 2013, p.269. P Paparseniou, *Griechisches Verbrauchervertragsrecht* (Selier European Law Publishers 2008), p. 71.

<sup>338</sup> Article 10(1), Law on Consumer Protection

non-exhaustive listing of examples which can give rise to a Representative Action (discussed below). Thus, a consumer association may bring a Representative Action against a supplier who is in violation of various provisions of the Consumer Act, as well as rules on consumer credit; package travels; time-sharing; e-commerce; advertising; regulations governing the production, distribution, and use of medicinal products; legislation regarding television and radio etc. As a leading scholar has accurately noted, this indicative listing of examples covers the entire spectrum of contemporary transactions. Therefore there is practically no area of action by suppliers, falling outside the reach of the Representative Action.<sup>339</sup>

Consumer associations can be either 'first-level' or 'second-level'.<sup>340</sup> Only natural persons may be members of a first-level consumer association. The law stipulates that at least a hundred (100) persons are required for the establishment of a first-level consumer association, except in the case of small municipalities (with a population under 5000), where fifty (50) members suffice. First-level consumer associations may become members of a second-level consumer association. At least five (5) first-level consumer associations are required for the establishment of a second-level consumer association.<sup>341</sup> Both types of consumer associations obtain legal personality when they are registered to the 'Registry of Consumer Associations', which is kept at the General Secretariat of Consumers (Ministry of Economy & Development).<sup>342</sup> The collective redress mechanism in the field of consumer law follows the opt-in approach.

The Law on Consumer Protection identifies three distinct types of actions that consumer associations may undertake:

1. First, 'every' consumer association may seek judicial protection for the individual rights of their members qua consumers.<sup>343</sup> This is an exceptional form of standing, whereby consumer associations initiate proceedings for the protection of rights belonging to third parties (i.e. consumers qua individuals). This type of judicial action does not deprive individual consumers of access to court, meaning that they could still file an individual action. However, if a consumer does file an individual action, then there will be no legitimate reason for the consumer association to initiate proceedings. It will be able, nonetheless, to intervene in support of the plaintiff consumer, in accordance with the rules on third party intervention (Article 80 CCP).
2. Furthermore, under certain conditions, consumer associations may file an action for declaration of the consumers' right to seek damages due to the illegal behaviour of suppliers or producers.<sup>344</sup> According to the Law on Consumer Protection, this action can be filed by a consumer

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<sup>339</sup> E Alexandridou/Ch Apalagaki in E Alexandridou (ed), *Consumer Protection Law* (Nomiki Vivliothiki 2015) p. 682 (in Greek)

<sup>340</sup> Article 10(2), Law on Consumer Protection

<sup>341</sup> See also Article 10(2), Law on Consumer Protection, which states that 'Consumer associations may be organised beyond the second level', meaning that five (5) or more second-level consumer association, may become members of an overarching association.

<sup>342</sup> Article 10(3), Law on Consumer Protection. See also General Secretariat of Consumers, 'Registry of Consumer Associations' <<http://www.efpolis.gr/el/synergasia-koinonikoi-etairoi/83-enoseis-katanaloton.html>>

<sup>343</sup> Article 10(15), Law on Consumer Protection. This type has been classified as '*group action - lato sensu*', see P Kolotouros, 'The Subject-Matter of the Stricto Sensu Group Action' (opinion) [2015] DEE (Business and Company Law Review) p. 1189 (in Greek)

<sup>344</sup> Article 10(16)(d), Law on Consumer Protection



association which has at least five hundred (500) active members and was registered in the Registry of Consumer Associations at least one year before the filing of the action.<sup>345</sup> Alternatively, the law stipulates that this action can be filed by a consumer association 'when the illegal behaviour harms the interests of at least thirty (30) consumers'. The court decision, which upholds this declaratory action, has the force of *res judicata vis-à-vis* the injured consumers, even when the latter did not participate in the proceedings.<sup>346</sup> The practical significance of this declaratory action is that it seeks to create the preconditions, which will allow a specific consumer (or consumers) to be compensated. However, the consumers' right to seek damages will be dependent on their ability to prove the exact amount of the damages that they suffered. Therefore, pursuant to a (collective) declaratory judgment, an injured consumer could file an individual claim, solely for the purpose of quantifying the exact amount of the injury. The issue of the supplier's liability will be covered by the *res judicata* of the judgment issued on the declaratory action. However, if the specific amount of an individual claim is certain or can be easily calculated, then the consumer concerned may submit an application for a payment order against a supplier which was found liable for damages, provided that the judgment which upholds the declaratory action has become 'irrevocable'.<sup>347</sup> A judgment becomes 'irrevocable' ('*ametakliti*') under Greek law, when it can no longer be reviewed by means of the so-called 'exceptional' legal remedies ('*anapsilafisi*' and '*anairesi*').

3. Finally, consumer associations fulfilling certain conditions may file a representative action for the protection of consumers, under Article 10(16) of the Law on Consumer Protection (hereafter 'Representative Action').<sup>348</sup> A Representative Action may be filed by a consumer association having at least five hundred (500) active members, which has been registered in the Registry of Consumer Associations at least one year before the filing of the action. Alternatively, a Representative Action may be filed by a consumer association 'when the illegal behaviour harms the interests of at least thirty (30) consumers'. A consumer association may bring a Representative Action against a supplier who is in violation of various provisions of the Consumer Act, as well as rules on consumer credit; package travels; time-sharing; e-commerce; advertising; regulations governing the production, distribution, and use of medicinal products; legislation regarding television and radio etc. As a leading scholar has accurately noted, this indicative listing of examples covers the entire spectrum of contemporary transactions. Therefore there is practically no area of action by suppliers, falling outside the reach of the Representative Action.<sup>349</sup> This judicial remedy, which constitutes the only genuine collective redress mechanism in the Greek legal order, will be explored in the following subsection.

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<sup>345</sup> Article 10(16), Law on Consumer Protection

<sup>346</sup> Article 10(20), Law on Consumer Protection

<sup>347</sup> *Ibid*

<sup>348</sup> P Kolotouros, The Subject-Matter of the *Stricto Sensu* Group Action, refers to this action as a 'group action- *stricto sensu*'

<sup>349</sup> E Alexandridou/Ch Apalagaki in E Alexandridou (ed), Consumer Protection Law (Nomiki Vivliothiki 2015) p. 682 (in Greek)

## 2. Representative Action in Consumer Protection

The report of the Hellenic Parliament's Scientific Service clarifies that the Representative Action is based on the continental model of actions brought by associations, such as the '*action associationnelle*' in French law or '*Verbandsklage*' in German law. The legal nature of the Representative Action is debated in the literature. According to one opinion<sup>350</sup>, when a consumer association files a representative Action, it exercises a (substantive) right belonging to it; therefore the consumer association is both plaintiff and the (legal) person entitled to the right, the protection of which is sought before a court. According to a different opinion, a consumer association which files a Representative Action, does not seek the protection of a right belonging to it; rather it has an exceptional form of legal standing, but this standing '*does not correspond to a right, interest or a claim belonging to it*'.<sup>351</sup> This theoretical debate will not be explored further, but it should be noted that both views have strong arguments, which cannot be discredited easily

### a. Competent Court

Representative Actions are adjudicated by the Court of First Instance (multi-judge formation or '*Polimeles Protodikio*'), which has jurisdiction for the place of residence or establishment of the defendant.<sup>352</sup>

### b. Procedural Framework

According to Article 10(16) of the Law on Consumer Protection, consumer associations may file 'any' Representative Action for the 'protection of the general interests of consumers'. Thereafter, this provision states that a Representative Action may have the following (indicative) claims:

1. The cessation of illegal behaviour of a supplier;<sup>353</sup>
2. Non-pecuniary damages, namely monetary compensation for 'moral damages',<sup>354</sup> or
3. A claim for interim measures (for the cessation of illegal behaviour or a claim for damages) until an enforceable judgment is issued.<sup>355</sup> This can include a claim for seizure of defective products, when the latter constitute a public health or safety hazard.

It should be noted that Representative Actions falling within the first two categories mentioned above, are subject to a special set of procedural rules, namely the rules for 'non-adversarial proceedings'.<sup>356</sup> This has a number of procedural consequences, the most important of which is the fact that the adjudicating court may order any measure necessary for determining the crucial facts of the case, as opposed to ordinary proceedings, where the court can only take into account the claims and allegations put forward by the

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<sup>350</sup> See E Alexandridou/Ch Apalagaki in E Alexandridou (ed), Consumer Protection Law (Nomiki Vivliothiki 2015) p675ff(in Greek)

<sup>351</sup> See P Kolotouris, The Subject Matter of the Stricto Sensu Group Action, *ibid* (n 24), p.1194 and the literature cited therein.

<sup>352</sup> Article 10(19), Law on Consumer Protection

<sup>353</sup> Article 10(16)(a), Law on Consumer Protection

<sup>354</sup> Article 10(16)(b), Law on Consumer Protection; Mikroulea, *Verbandsklage auf Schadenersatz im griechischen Verbraucherschutzgesetz*, in Hopt/Tzouganatos, *Euopaeisierung des Wirtschaftsrechts*, 2006, p. 309.

<sup>355</sup> Article 10(16)(c), Law on Consumer Protection

<sup>356</sup> Article 10(20), Law on Consumer Protection. See also Article 739ff CCP.

parties. Finally, the Law on Consumer Protection states that the Representative Action must be filed within six (6) months from the illegal behaviour of the supplier.<sup>357</sup>

### **c. Standing**

In respect to the conditions laid down in para. 4 points (a)-(c) of the Recommendation, consumer associations, under Greek law, have as their exclusive aim the protection of rights and interests of consumers as a group. They, therefore, satisfy the criteria of points (a) and (b) of para 4 of the Recommendation regarding their non-profit making character and the existence of a direct relationship between their main objectives and the rights that are claimed to have been violated in respect of which the action is brought.

As regards point (c) of para 4 of the Recommendation, there are no requirements in respect to the entities' capacity in terms of financial and human resources, and legal expertise. The only requirement for bringing a Representative Action is that the entity must have at least five hundred (500) active members, meaning that they have fulfilled their financial obligations by having paid their membership fees. This requirement ensures a certain degree of financial capacity for the entity. However, in case that a Representative Action is brought on the grounds that at least thirty (30) consumers have been harmed by the alleged illegal behaviour of a supplier, the plaintiff entity is not required to satisfy the aforementioned requirement.

Besides the aforementioned requirements, consumer associations don't face any other duty to prove that they have the administrative and financial capacity to bring the claim.

The Consumer Act also stipulates that the certified status of consumer associations is revoked, when they don't demonstrate any activity for two years or violate certain provisions of the Consumer Act (e.g. the prohibition to accept donations from suppliers or political parties; the prohibition of using as their facilities the homes or headquarters of the natural or legal persons that participate in them; the prohibition of advertising in any way businesses of suppliers; the prohibition of having in their administrative board persons convicted for a series of offenses; the prohibition of providing remuneration to the members of their administrative board for their services).<sup>358</sup>

If the legal requirements for filing a Representative Action are not satisfied, then the consumer association is simply not entitled to bring it and the relevant application must be dismissed.

### **d. Injunctive Relief and Expediency**

When there is need for a quick grant of an injunctive order, consumer associations may request the court to order interim measures. Under the Code of Civil Procedure,<sup>359</sup> the court may order interim measures when there is a 'case of emergency' or 'imminent danger'. Such an example would be the case of defective products which pose a risk to the safety or health of consumers. In that case, the Consumer Act states that the court may order the seizure of the said products.<sup>360</sup> Furthermore, under the procedural rules

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<sup>357</sup> Article 10(18), Law on Consumer Protection

<sup>358</sup> Article 10(12) of the Consumer Act

<sup>359</sup> Article 682 Code of Civil Procedure

<sup>360</sup> Article 10(16)(c) of the Consumer Act

which apply to interim measures, the court may issue a 'provisional order' until it reaches a decision on the applications for interim measures.<sup>361</sup> Under a provisional order - which may be revoked by the court at any time<sup>362</sup> - the court may order any measure which it considers to be necessary.

Consumer associations will, however, face procedural difficulties to invoke and prove that there are circumstances which justify the granting of interim measures. Under the Consumer Act, when a consumer association files a Representative Action seeking injunctive collective redress, the claim will be adjudicated under a special set of procedural rules, namely the rules for 'non-adversarial proceedings', at the 'earliest possible hearing date'.<sup>363</sup> The adjudicating court may order any measure necessary for determining the crucial facts of the case, even those facts which have not been invoked by the parties, without being bound by the ordinary procedural rules regarding evidence (articles 744 and 759(3) CCP). There is no time limit for the full adjudication of claim. However, when a consumer association files a Representative Action, the claim is fixed to be examined at the 'earliest possible hearing date' (article 10(20) of the Consumer Act). Usually there will only be one hearing and the court will thereafter issue its judgment, the exact timing depending on the difficulty of the case and the volume of the evidence.

Therefore, the quick adjudication of cases under the rules for 'non-adversarial proceedings', will often impede the plaintiff representative entity from arguing that there is a 'case of emergency' or 'imminent danger', which justify the granting of interim measures.

Arguably, the subject matter of the Representative Action is not the resolution of a private dispute between the parties to the proceedings, but 'the determination of a legal fact or the creation of a new legal situation'.<sup>364</sup> This corresponds to the choice of the Greek legislature to select the rules on 'non-adversarial proceedings' for the adjudication of the Representative Action, as opposed to the ordinary rules on adversarial proceedings.

#### **e. Res Judicata of the Representative Action**

One of the most interesting legal question regarding Representative Actions, relates to the force of res judicata. Article 10(20) of the Law on Consumer Protection states that the court decision that is issued following a Representative Action (for damages or for the cessation of illegal behaviour) '*has force erga omnes, even if they were not parties to the proceedings*'.

Article 10(21) of the Law on Consumer Protection, grants the power to the Minister of Development to issue a ministerial order, obliging suppliers to abide to a court decision issued on a Representative Action. The Supreme Administrative Court (Council of State), in its decision 1210/2010 (plenary session) - which upheld the constitutionality of this legislative provision - seemed to confirm the opinion of those who adopt the broad interpretation of res judicata, according to which the force of res judicata of a Representative Action extends to suppliers who did not participate in the court proceedings. According to this provision, the Minister of Development may issue a ministerial order, specifying the terms and conditions for the compliance of

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<sup>361</sup> Article 781 Code of Civil Procedure

<sup>362</sup> Article 781(2) Code of Civil Procedure

<sup>363</sup> Article 10(16)(a) and Article 10(20) of the Consumer Act; See Article 739ff Code of Civil Procedure

<sup>364</sup> See E Alexandridou/ Ch Apalagaki in E Alexandridou (ed), Consumer Protection Law (2015) p. 675 and the case law cited therein

suppliers' commercial behaviour to the res judicata of irrevocable court decisions on actions brought by consumers and consumer associations (Representative Actions). The law states that this power is exercised by the Minister, insofar as the consequences of the force of res judicata are of a 'broader public interest for the proper functioning of the market and the protection of consumers'. Envisaged are situations in which a consumer or a consumer association brings an action against a supplier regarding a general term or some form of standard practice followed by several suppliers. In order to ensure timely compliance with the decision, even by suppliers who were not parties to those proceedings, and in order to resolve a problem which impeded the normal function of the market, the Minister may clarify and codify in the above decision how suppliers are to behave in the future.

The Minister of Development has exercised the power awarded to him by the aforementioned provision, in the area of the general terms used by banks. Following several 'irrevocable' decisions issued by courts on actions by consumers and consumer associations, which had ruled that certain general terms of loan, credit card and deposit account agreements were abusive and thus void, the Minister issued a ministerial order in 2008, codifying all the abusive general terms and prohibiting their further use (as well as the use of any amended but equally abusive terms). The banks appealed against the ministerial decision before the Supreme Administrative Court (Council of State), which in plenary session ruled on the interpretation of art. 10 (21) law 2251/1994.<sup>365</sup> The Court, upholding the Ministerial Decision, clarified that the Minister has the power to specify the application of court decisions, without expressing any own judgment beyond that of the courts. In other words, the Minister does not assume the function of the courts, by ruling on individual cases, but merely specifies the terms under which suppliers shall abide to the res judicata of court judgments. The ministerial decision is based on court decisions, which are anyway binding erga omnes. Suppliers who were not parties to the proceedings, on which the court decisions were issued, are always entitled according to the Constitution and the ECHR to oppose to those erga omnes binding court decisions by means of third party opposition, as foreseen in the Greek Code of Civil Procedure. The banks that participated in the proceedings, argued that there was no reason of public interest which justified the adoption of the measure, as required under Greek law for issuing a ministerial decision. The Court rejected this argument since consumer protection authorities had received more than 1,500 complaints against those terms. Furthermore, the Court affirmed the Minister's power to additionally forbid terms essentially similar to those contained in the court decisions, in order to avoid circumvention of the ministerial decision by the suppliers and because it would be impossible for the Minister to include all possible variations of the forbidden terms.

It should be noted, that after the Council of State delivered its judgment in the aforementioned case, the 2008 Ministerial order was amended twice.<sup>366</sup> Pursuant to these amendments, insurance companies are prohibited from using general terms and conditions, which have been declared unfair by courts, ruling on Representative Actions.

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<sup>365</sup> Council of State (Plenary session) 1210/2010 (NOMOS Legal Database); Rokas/Gortsos/ Mikroulea/ Livada, Elements of Banking Law, 2016, p. 498 (in greek).

<sup>366</sup> See Ministerial Orders Τ Α Ζ1-21/2011 (Government Gazette 21/ Β 18 January 2011) and Ζ1 -74/2011 (Government Gazette 292/ Β 22 February 2011)

## **f. Protection of Consumers in Different EU Member States**

The Law on Consumer Protection, which transposed the Directive 2009/22/EC on injunctions for the protection of consumers' interests, qualified entities from another Member State are entitled to bring an action for the collective interests of the consumers before the Greek courts.<sup>367</sup>

According to Article 10(30) of the Law on Consumer Protection, in the case of an infringement falling within the scope of Article 10(16) of the Law on Consumer Protection, 'any qualified entity from another Member State where the interests protected by that qualified entity are affected by an infringement' may seek judicial protection. Specifically, the qualified entity may file a Representative Action requesting the cessation of illegal behaviour of a supplier or it may submit a claim for interim measures.

As far as the question of legal standing is concerned, Article 10(30) of the Law on Consumer Protection states that the Greek courts and administrative authorities shall accept the list compiled by the European Commission pursuant to Article 4 of Directive 2009/22/EC, as proof of the legal capacity of the qualified entity to seek judicial protection. This is without prejudice to the right of courts and administrative authorities to examine whether the purpose of the qualified entity justifies its taking action in a specific case.

## **g. Funding**

The Law on Consumer Protection does not contain provisions regarding the funding of a Representative Action. Under article 10(6) the resources of consumers' associations are exclusively: Registration fees, contributions and voluntary contributions from their members; income generated from their property; inheritance or bequest (legacy); grants from municipal or regional authorities; subsidies from the European Union, international organizations and international consumer associations; the amount of compensation for non-pecuniary damages that is awarded pursuant to a Representative Action (minus a percentage of 20% which is directed to the General Secretariat of Consumers for consumer protection purposes);<sup>368</sup> income generated from the distribution of publications and public events.

Others forms of private funding are not allowed. Every grant-decision by local or regional authorities, the EU, international organizations, and international consumer associations has to be notified to the General Secretariat of Consumer.<sup>369</sup> If a consumer association violates this provision of private funding then it will be subject to different penalties, as explained in detail in the next subsection (article 10 par. 27 of the Law on Consumer Protection). According to article 10(8), consumer associations are forbidden to accept donations, contributions and other forms of support from political parties or suppliers. Furthermore, consumer associations are forbidden to accept remuneration from its members, for the legal remedies (individual or collective) that were filed by the former for the protection of consumers.<sup>370</sup> Consumer associations are not required to declare the origin of any funding (e.g. membership fees etc) to the court at the outset of proceedings.

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<sup>367</sup> Delouka-Igglei, *Consumer Protection Law* (2014, in Greek), p.344-345. See Article 10(30), Law on Consumer Protection, which was introduced through Article 2(3) of the Ministerial Decision YA Z1-111 (Government Gazette B/627 7 March 2012).

<sup>368</sup> Article 10(22), Law on Consumer Protection

<sup>369</sup> Article 10(7), Law on Consumer Protection

<sup>370</sup> Article 10(25), Law on Consumer Protection

## **h. Out of Court settlements**

In Greece out-of-court settlements are not common. Other forms of alternative dispute resolution are also available but - according to Greek Law - contrary to arbitration, a decision through an alternative dispute resolution mechanism is not binding on the parties.

Mediation is one such form. The Law 3898/2010 (Government Gazette A/211 16 December 2010), which transposed the Directive 2008/52/EC into the Greek legal order, applies to mediation processes whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator. Under this law, the mediation process applies in civil and commercial matters. However, the law explicitly states (article 2) that this procedure does not apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law. Such rights and obligations are particularly frequent in family law and employment law.

Also of importance is the Hellenic Consumers Ombudsman (L. 3297/2004, Government Gazette A/259 23 December 2004)<sup>371</sup>, which is an Independent Authority. It functions as an independent agency of out-of-court dispute resolution in the area of consumer disputes.

Article 11 of the Consumer's Act establishes the institution of 'Committees of Amicable Settlement'. These are responsible to resolve out-of-court disputes between a consumers and suppliers. The initiation of this alternative dispute resolution process is at the discretion of consumers.<sup>372</sup> Pursuant to the Law 3852/2010 [article 94(2)], the powers of the Committees of Amicable Settlement have been transferred to the country's municipalities. The Consumer Ombudsman functions as quasi-Appellate Body having the power to review the reports of the Committees, in order to ensure the consistent application of the law.

The European Consumer Centre of Greece (ECC-Greece) was launched in 2005, under the auspice of the General Secretariat of Consumers. As from 1-1-2012, ECC-Greece has been operating under the auspice and with the support of the Hellenic Consumer Ombudsman, an Independent Authority of the public sector mandated with the out-of-court consensual settlement of consumer disputes.<sup>373</sup> The operation of ECC-Greece is also foreseen in article 22 of Law 3844/2010 (which transposed Directive 2006/123/EC into the Greek legal order) as contact point for providing information to consumers as regards - *inter alia*: information relating to rules on consumer protection; the means of redress available in the case of a dispute between a supplier and a consumer; and the contact details of associations or organizations, from which consumers may obtain practical assistance.

Another institution worth mentioning in the banking and investment sector, is the Hellenic Ombudsman for Banking-Investment Services (HOBIS). This is a private, non-profit entity which was formed in 2005, following the merger of the Banking Ombudsman and the Investment Ombudsman. It examines

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<sup>371</sup> Papaioannou/Tziva in *Alexandridou, E.*, Consumer Protection Law, p. 715 (in Greek).

<sup>372</sup> Papaioannou/Tziva in *Alexandridou, E.*, Consumer Protection Law, 2015, p. 721 (in Greek)

<sup>373</sup> Papaioannou/Tziva in *Alexandridou, E.*, Consumer Protection Law, p. 742.

disputes arising from the provision of banking and investment services, aiming at their amicable settlement.<sup>374</sup>

Of importance is also SOLVIT, which is a service provided by national authorities across the EEA. The Ministry of Finance operates as the national SOLVIT centre in Greece. SOLVIT is free of charge. It is mainly an online service. SOLVIT can provide assistance to businesses or individuals who claim that their EU rights are breached by public authorities.<sup>375</sup> SOLVIT aims to find solutions within 10 weeks, provided that the case has not yet been taken to court.

In consumer law cases, it is highly unlikely that any settlements will be examined by courts. If a settlement is achieved under the auspice of the Hellenic Consumers' Ombudsman, the said settlement will not be examined by a court, whereas the Ombudsman will not express a judgment on the fairness or unfairness of the settlement terms.

Moreover, if the parties reach an amicable agreement on the settlement of their dispute with the assistance of a mediator accredited under Law 3898/2010,<sup>376</sup> the parties may choose to file the original document to the secretariat of the Court of First Instance ('Single-judge formation' or 'Monomeles Protodikeio'), where the mediation was achieved. In these cases, the court will not verify whether the rights and interests of the parties are protected, as this procedure merely aims to render the minutes of the settlement enforceable,<sup>377</sup> without examining the substance of the mediation.

#### **i. Limitation Periods & ADR**

The limitation or prescription periods are suspended in respect to ADR of domestic and cross-border disputes concerning contractual obligations stemming from sales contracts or service contracts between a trader established in the Union and a consumer resident in the Union through the intervention of an ADR entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution.<sup>378</sup> The filing of an application for ADR suspends the limitation or prescription periods, throughout the duration of the procedure. After the completion of the procedure, the suspended limitation or prescription periods resume.<sup>379</sup>

Moreover, the limitation or prescription periods are also suspended, in respect to mediation processes under Law 3898/2010.<sup>380</sup>

#### **j. Loser pays principle**

According to article 176 of the CCP, the losing party is ordered to pay the litigation costs, which include both the court costs and lawyers' fees. The Greek legislator links the 'loser pays principle' to the principle of fault. The

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<sup>374</sup> Papaioannou/Tziva, in Alexandridou, *E.*, Consumer Protection Law, p. 739, Karakostas, I., General Conditions of Transactions, 2001, p.128 (in Greek).

<sup>375</sup> Papaioannou/Tziva, in Alexandridou, *E.*, p. 743

<sup>376</sup> Article 11 of the Law 3898/2010 (Government Gazette A/211 16 December 2010)

<sup>377</sup> Article 9 of the Law 3898/2010

<sup>378</sup> See Joint Ministerial Decision 70330/30.6.2015 (Government Gazette B/1421 9 July 2015). This Ministerial Decision transposed into the Greek legal order the Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)

<sup>379</sup> Article 11 of the Joint Ministerial Decision 70330/30.6.2015

<sup>380</sup> Article 11 of the Law 3898/2010 (Government Gazette A/211 16 December 2010)



losing party is deemed to be responsible for the court proceedings and for that reason must pay all litigation costs. However, in case of partial winning and partial defeat of each litigant the court may apportion the legal costs in proportion to the extent of the success of each litigant's arguments.<sup>381</sup> In such cases, the Court will also set the lawyers' fees. In case where the 'interpretation of the invoked rule of law' was difficult and, as a result, the outcome of the trial was reasonably uncertain, the Court may set off legal costs between the litigants.<sup>382</sup> In addition, Art. 185 CCP provides that all or part of the expenses may be imposed on the winning party if 1) the judge decides that the winning party has not complied with the 'duty of truth' ; 2) if this party proposed a procedural means of 'offence' or 'defence' or produced a piece of evidence at a late stage of trial, whereas the judge decides that it could have been proposed or produced earlier, 3) this party is responsible for the invalidity or a procedural action or of the hearing.

#### **k. Remedies**

Non-pecuniary damages can be awarded in representative actions. In such cases, these damages take the form of punitive damages that is awarded to the organisation and must be used for further consumer protection purposes. This remedy may also be pursued by the competent chambers of business, commerce and industry.<sup>383</sup> The Greek Legislator expressly imposes this penalty only once on the same person, regardless of the frequency of their illegal actions, in conformity with the basic principle *ne bis in idem*.<sup>384</sup> Finally, according to article 10(22), part of this compensation (20%) is given to the General Secretariat for Consumers, with the aim of financing activities relevant to consumer protection.

#### **l. Enforcement of Injunctive Orders**

According to Article 947 of the Code of Civil Procedure, in cases of injunctive relief, the court decision may state that the defendant supplier is liable to pay a monetary penalty up to one hundred thousand euros (€100,000) for any violation of the injunctive order, which is awarded to the plaintiff. Moreover, the injunctive order may impose detention up to one year against the in-compliant supplier. If the aforementioned penalties are not included in the injunctive order, the consumer association may file an application to the Court of First Instance ('Single-judge formation' or 'Monomeles Protodikeio'), requesting the imposition of the said penalties.<sup>385</sup>

If a supplier does comply with an injunction ordering the recall, seizure, or destruction of defective products, then Article 945 of the Code of Civil Procedure stipulates that the consumer association may enforce the order itself at the cost of the supplier.

There is no formal-judicial mechanism for monitoring compliance with an injunction order. Essentially, the party who filed the injunctive request, will monitor whether the defendant has complied with the court order. If the defendant refuses to comply with the court's decision, the plaintiff will file a

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<sup>381</sup> Article 178 CCP

<sup>382</sup> Article 179 CCP

<sup>383</sup> Article 10(24), Law on Consumer Protection

<sup>384</sup> See St. *Mathias*, Collective Redress (1993) *Elliniki Dikaiosini* . p. 3 (in Greek). See further Areios Pagos 1219/2001, 589/2001 (2001) DEE (Business and Company Law Review) p.1117, 1128

<sup>385</sup> Article 947 Code of Civil Procedure. The Court of First Instance will follow the procedural rules of Articles 614ff Code of Civil Procedure.

request to the Court of First Instance ('Single-judge formation' or 'Monomeles Protodikeio'), for the enforcement of the injunctive order. Finally, under the Greek Criminal Code,<sup>386</sup> a supplier that does not comply with an injunctive order may face a minimum sentence of imprisonment for six (6) months, when the requirements of that provision are satisfied.

## B. Competition Law

Greece does not have a sectoral mechanism in place for mass harm situations produced by violations of competition law and the country has yet to transpose Directive 2014/104/EU on antitrust damages actions into national law. In Greek law there is no special provision of private enforcement of competition law. Actions in civil courts are based on the general provision of the Greek Civil Code (GCC) on torts. Article 914 of the GCC provides that any person who has caused illegally and through his fault harm to another shall be liable for compensation'.<sup>387</sup> Furthermore, the Greek lower courts have held that a violation of the 1977 Competition Act<sup>388</sup> can also be classified as an illegality in the sense of art. 914 GCC.<sup>389</sup> The Supreme Civil Court (Areios Pagos) seemed to accept that a violation of the 1977 Competition Act constituted a tort,<sup>390</sup> and later decisions accepted that violations of the new Competition Act which replaced the previous regime (Law 3959/2011) can qualify as torts if the other elements of torts are also fulfilled (fault, prejudice/damage and causality between the unlawful act and the harm).<sup>391</sup> The enactment of Regulation 1/2003 did not bring any changes to the legal status of private enforcement of competition law. Another provision allowing actions for damages in case of antitrust infringements is article 919 GCC,

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<sup>386</sup> Article 232A(1) of the Greek Criminal Code

<sup>387</sup> C. Taliadoros, Translation of Greek Civil Code, 2000 (in Greek). See also *D Papadopoulou-Klamari /A Mikroulea*, Private Enforcement and Collective Redress, FIDE XXVII, Congress Budapest, 2016, Vol. 2 (Greece National Report), L Athanassiou, Collective Redress and Competition Policy, in A Nuyts and N E. Hatzimihail (ed.), Cross Border and Class Actions, 2014, p. 145, I *Symplis*, Damages Actions, Greek Report, in B. Cortese (ed.), EU Competition Law between public and private enforcement, 2013, p.269.

<sup>388</sup> Law 703/1977 which has been replaced by Law 3959/2011

<sup>389</sup> D. Tzouganatos, Competition Law in Greece, 2015, p. 118=International Encyclopedia of Laws/Competition Law, Volume Greece, 2015, p. 118, I *Soufleros*, Regulation 1/2004, 2015 (in Greek), I *Soufleros*, Directive 2014/104/EU and its relation to Regulation 1/2003, NoB (Legal Tribune)2015, 921 (in Greek), Art.6 (2), M. Marinos, Unfair Competition (in Greek), 2015, p. 21, L. Athanassiou, in Tzouganatos, Free Competition Law, Ch. 24, Civil Claims 9 (in Greek), 2013, p. 1275, G. Triantafillakis, Competition Law (in Greek), 2013, p. 132, C. Iliopoulos, Verstoß gegen Art. 85, 86 EWGV und Schadensersatz nach griechischem Recht, Europarecht 1986, 292, C. Iliopoulos, Die Anwendung des Europäischen Kartellrechts in Griechenland – Die Rechtsprechung der griechischen Gerichte und die Entscheidungspraxis der griechischen Kartellbehörde, 1999, C. Iliopoulos, , Competition Law in Greece (1981-2005), 2006 (in Greek), A. Mikroulea, Collective Redress in European Competition Law, ZWeR 2017, A. Mikroulea, Private Enforcement, FIDE XXIV, Congress Madrid, 2010, Vol. 2, p. 231, D.P.Tzakas, Collective redress in the Field of EU Competition Law. The Need for an EU Remedy and the Impact of the Recent Commission Recommendation in Legal Issues of Economic Integration, 41 (2014), No. 3, p. 225, 229,

<sup>390</sup> Minority view in the decision 2/1989, 1989 EEmpD (Commercial Law Review), 657 (in Greek).

<sup>391</sup> A. Delikostopoulou, Private Enforcement in favour of consumers (in Greek), in Kokkoris/Lianos, The Reform of Competition Law, 2008, p.434, E Trouli, The Green Paper on Damages Actions for Breach of the EC Antitrust Rules (in Greek), 2007 Evropaion Politeia (European State), p. 930, A Bouhagiar, Civil liability for EC competition law infringements (in Greek), 2009, p. 35.

which reads: 'Anyone who willfully causes harm to another person in a manner contrary to bonos mores is liable to [pay] compensation'.

In principle pecuniary damages and non-pecuniary (moral) damages are available in these claims. Damages may include restitution in kind (in natura), according to article 297 GCC, at the discretion of the court. Restitution in kind is however the exception. In the case which gave rise to the Decision 6042/2002 of the Athens Court of Appeal,<sup>392</sup> the plaintiff, a pharmaceutical wholesaler, brought an action against the subsidiary of a pharmaceutical company that refused to supply medicinal products, requesting that the defendant be ordered to supply. The plaintiff claimed that the defendant refused to supply it with the requested quantities of medicines, whilst the defendant allegedly satisfied in full orders placed by other wholesalers. The Court of Appeal held that a refusal to supply constituting a breach of Article 1 of Law 703/1977 is an illegal conduct under Article 914 of the Greek Civil Code and, provided that the other requirements of Article 914 CC are fulfilled, any person suffering damage as a result of such illegal conduct has a right of compensation. Such compensation may also be awarded in kind, i.e. by obliging the defendant to continue to supply the plaintiff.

## **1. Remedies**

The remedy of injunction (cease and desist order) in cases of antitrust infringements is disputed in legal theory. Greek law does not foresee a general remedy of injunction. According to the Greek Code of Civil Procedure (CCP) there are two main kinds of actions that are available in civil cases: action for performance/injunction and action for recognition/declaration. Through the latter the plaintiff seeks a judgment confirming the existence or non-existence of a legal relation. Through the former action the plaintiff can seek a judgment obliging the defendant to specific performance/behaviour, an injunction or the adjudication of damages.

Article 25(5) of the Competition Act (Law 3959/2011) stipulates that a grant of interim relief by the HCC does not prejudice the competence of the civil courts. The Hellenic civil courts are allowed to order the general provisions of CCP. Civil courts can give an interim relief order, according to Article 682, when there is a 'case of emergency' or a 'need to avoid an imminent risk'. The Court can order - among other measures - the grant of warranty, the temporary seizure, the temporary adjudication of a claim and the temporary regulation of the situation.<sup>393</sup> It has to be pointed out that the HCC can also order interim measures provided that an imminent danger of irreparable damage to the public interest is substantiated. HCC can order interim measures either on its own or on petition of the Minister of Finance if an antitrust violation is reasonably foreseen.

## **2. Private Enforcement, stand alone and follow-on claims**

Stand-alone actions are possible under Greek law, but they have not been very frequent. Claims of competitors or consumers have not been common until now. The most known cases involving a refusal to deal concerned civil suits that were brought by wholesalers regarding parallel imports. These

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<sup>392</sup> (2003) DEE (Business and Company Law Review), p.282

<sup>393</sup> Tzouganatos, D., Competition Law in Greece, p. 128.

cases reached the ECJ.<sup>394</sup> An example of refusal to deal can be seen in the case of 'OPAP' (Hellenic Organization for Football Prognostics SA), which was found to have abused its dominant position and consequently damages were awarded.<sup>395</sup> The Supreme Court concluded that, on the facts of the case, the behavior of OPAP constituted both an abuse of dominant position and a common civil tort, under Article 919 GCC and awarded damages equal to the profits realized by the third party who had been offered a contract instead of the plaintiff. Follow-on actions have also not been frequent. One main reason for that is the procedure before the Hellenic Competition Commission (HCC) is usually lengthy and time limitation for private actions under the provisions on torts are five years from the time when the damage and the identity of the tortfeasor were known. Therefore, potential plaintiffs fear that awaiting for a decision of the HCC may cause their claims to become statute-barred. There is no suspension of limitation periods until the HCC reaches its decision. It is expected, however, that the law transposing the antitrust damages directive will include a provision suspending the limitation period.

A case where a complaint to HCC was accompanied by a civil action was '*I. Milopoulos and Co. v. Masterfoods BV and Katastimata Aforologiton Eidon AE (Hellenic Duty Free Shops - HDFS)*'. The complainant (I. Milopoulos and Co.) was the exclusive distributor of Masterfoods BV products for the Greek travel retail market. In 2004 its contract was terminated, as a result of a direct supply agreement between HDFS and Masterfoods BV. The complainant brought a complaint before the HCC, alleging that the two companies entered into an agreement to terminate the complainant's contract, in violation of article 1 of the 1977 Competition Act (replaced by Law 3959/2011). The complainant also alleged that HDFS abused its dominant position in the Greek travel retail market, with the purpose of excluding the complainant from that market. The complainant subsequently reached a settlement with Masterfoods BV and withdrew the first part of complaint (the terms of the settlement are confidential, therefore no further comments can be made). The complaint against HDFS was rejected by the HCC<sup>396</sup> on the grounds that: (1) there was general policy on the part of HDFS to enter into direct supply contracts with manufactures and refuse to be supplied by resellers and; (2) this policy was objectively justified on efficiency grounds and was beneficial to consumers. An appeal against the HCC decision was rejected by the Administrative Court of Appeal of Athens<sup>398</sup> and the Council of State.<sup>399</sup> An application for annulment is currently pending before the Council of State. A civil action against HDFS is also pending at the moment.<sup>400</sup>

Among the hard-core abuses that have been investigated by the HCC, few cases were likely candidates for follow-on actions. This is true of both cartel and abuse of dominance cases. A good example constitutes the milk cartel case.<sup>401</sup> In that particular case, a horizontal price-fixing agreement was complemented by vertical resale price maintenance agreements between dairy producers and supermarket chains. Under the circumstances, even if

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<sup>394</sup> C 53/03 Syfait and others (2005) and Joined Cases C 468/06 to 478/06 Sot. Lelos kai Sia and others (2008)

<sup>395</sup> Areios Pagos (Supreme Court) 1497/2009 (NOMOS Legal Database)

<sup>396</sup> HCC 364/2007

<sup>398</sup> Administrative Court of Appeal of Athens, 2057/2010

<sup>399</sup> Council of State, 3123/2014.

<sup>400</sup> I Symplis, Damages Action, Greek Report, in B Cortese (ED.), EU Competition Law between public and private enforcement (2013) p. 269

<sup>401</sup> Judgment of the CJEU of 10 February 2004, case C-85/03 *Mavrona & Sia OE v. Delta Etairia Symmetochon AE* [2004] ECR-I1573, 272.

the cartel overcharge had affected the overall profits of the retailers, by reducing their turnover (something highly unlikely, given the low price elasticity of demand and limited substitutability of the relevant products), it is safe to assume that any disputes between producers and retailers will be amicably settled in the course of their ongoing commercial relationship. At the same time, a collective action by consumers, in such cases was clearly futile even without taking into account any of the other usual and well-documented problems (standing of indirect purchasers, proof of passing-on, cost-effectiveness). Other cases with horizontal price-fixing agreements in markets for non-uniform products or services are less suitable for collective actions.<sup>402</sup> In such cases, in the absence of product uniformity, a separate counterfactual competitive price must be calculated for each individual case, something extremely difficult to do in a cost-effective manner.

There is a strong possibility that the cases that are likely candidates will be either settled out of court or are still pending, as the potential plaintiffs are still waiting for the outcome of the appeals against the decision of the HCC and are not in a hurry to bring a claim before the civil court or to ask for an early date for a trial.

### **3. Consumer Law Representative Action and Competition mass claims**

It should be noted that the Law on Consumer Protection indicates certain provisions, the violation of which may give rise to a collective action. Although the competition law provisions are not laid down, it is unanimously accepted in the legal literature that since the enumeration is not exhaustive, anti-competitive practices by suppliers may trigger collective redress proceedings.<sup>403</sup> However, the provisions of consumer protection law would be a very imperfect solution for antitrust violations.<sup>404</sup> Courts have not dealt with actions filed by consumer associations pursuant to violations of Competition Law. However, consumer law might be an inappropriate means for addressing antitrust violations for a number of reasons.<sup>405</sup> First, consumer law does not provide guidance to several contentious questions which will arise in proceedings regarding antitrust violations, such as: the precise way of

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<sup>402</sup> See e.g. HCC 460/V/2009, *Audatex and others*, a case involving an agreement among car insurance companies to impose uniform hour rates for car repairs. The decision was quashed by the Athens Administrative Court of Appeal on technical grounds. See Athens Administrative Court of Appeal n. 2132-5/2010. See also HCC 518/V/2011, a case involving price fixing (uniform fees)

<sup>403</sup> D.Tzouganatos, *Competition Law in Greece*, *ibid*, p. 129 (in English), D. Avgitidis, (2015) DEE (Business and Company Law Review) p. 673; A. Delikostopoulou, in I. Kokkoris/I. Lianos, p. 441, (in Greek). L. Athanasiou, in Tzouganatos, *Competition Law*, 2013, p. 1343 (in Greek); A. Papadelli, 'From the White Paper to the Unofficial Proposal for a Directive' [2010] DEE 662.

<sup>404</sup> See D Avgitidis, 'Actions for Damages for Violations of Competition Law' (2015) DEE (Business and Company Law Review) p. 673; A Delikostopoulou, in I Kokkoris/I Lianos, p. 441, (in Greek); L Athanasiou in Tzouganatos, *Competition Law*, 2013, p. 1344 (in Greek) A Papadelli, 'From the White Paper to the Unofficial Proposal for a Directive' [2010] DEE (Business and Company Law Review) enp. 662.

<sup>405</sup> See D Avgitidis, 'Actions for Damages for Violations of Competition Law' (2015) DEE (Business and Company Law Review) p. 673; A Delikostopoulou, in I Kokkoris/I Lianos, p. 441, (in Greek); L Athanasiou in Tzouganatos, *Competition Law*, 2013, p. 1344 (in Greek) A Papadelli, 'From the White Paper to the Unofficial Proposal for a Directive' [2010] DEE (Business and Company Law Review),p. 662.

allocating damages which have been adjudicated to a large number of consumers; the way of financing a collective action; the disclosure of evidence etc. These questions are addressed through Directive 2014/104/EU as far as individual actions are concerned, but in the area of collective redress there is a legislative gap. Furthermore, some provisions of Consumer Law are inappropriate for the specific area of Competition Law violations. For instance, under Consumer Law, a Representative Action must be filed within six (6) months from the last demonstration of illegal behaviour by a supplier or producer.<sup>406</sup> This short time frame is inappropriate for antitrust violations, where detection of infringements is extremely difficult. This is particularly the case for cartel violations, as participants in cartels take extreme caution to avoid detection.

#### **4. Unfair Competition**

Article 10 of the Law 146/1914 on unfair competition allows individual traders, trade and industry associations, and chambers of commerce to bring an action before the courts seeking an injunction against traders for unfair competition. Such associations may seek injunction against traders violating article 1 of the said law (general clause against unfair competition), article 3 (prohibition of inaccurate statements about price, quality, origin etc. of products), articles 6-8 (exceptional sales and discounts), and article 9 (regulation of sale of specific goods). The legislator, in recognising the right of trade associations to seek an injunction, intended to introduce some sort of 'self-regulation', in cases in which individual traders would be reluctant to bring individual actions against infringers of the law. An action by a trade association presupposes a) that the act, against which the injunction is sought, affects the interests of a member of the association, and b) that the protection of the interests of its members is within the purpose and the scope of the association's articles of association.<sup>407</sup> For example, the association of bus owners is entitled to bring an action against taxi drivers for unfair competition in the form of offering illegal competing transport services.<sup>408</sup> However, a trade union (as opposed to a trade association) does not have standing to bring such action, since it is not directly affected by the action, against which infringement is sought, and trade unions are not included in the persons entitled to bring actions according to art. 10 of law 146/1914.<sup>409</sup>

#### **5. Lawyers' Fees**

Lawyers' fees are freely negotiable. In many cases they are determined by reference to the fees set out in the Code of Lawyers (Law 4194/2013), which apply when there is no written agreement between client and lawyer. In particular, the Code of Lawyers provides the remuneration of lawyers for drafting a lawsuit for damages and submitting pleadings before the civil courts equates to a certain percentage of the amount claimed, as follows: 2% claims up to 200.000 euros; 1.5% for claims between 200.001 to 750.000 Euros; 1% for claims between 750.001 to 1.500.000 Euros; 0.5% for claims between 1.500.001 to 3.000.000 Euros; 0.3% for amounts between 3.000.001 to 6.000.000 euros; 0.2% for amounts between 6.000.001 to

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<sup>406</sup> Article 10(18), Law on Consumer Protection.

<sup>407</sup> Marinou, Unfair Competition, 3<sup>rd</sup> ed. 2015, p. 398 (in greek).

<sup>408</sup> Court of Appeals of Larissa, 25/2014

<sup>409</sup> Areios Pagos, 1125/2011.

12.000.000 euros; 0.1% for amounts between 12.000.001 to 25.000.000 euros; 0.05% for claims exceeding 25.000.000 euros. It is reiterated that these percentages apply if the parties have not agreed otherwise in a written agreement. The law also provides the option of contingency fees

In our opinion, the abusive litigation and/or frivolous litigation can arise based upon the lawyers fees systems due to the way in which lawyers are remunerated on the basis of hourly rates,<sup>410</sup> which is often the case when the defendant is a corporation. This might negatively impact the incentive to litigate, as it will be in the interest of lawyers to increase their billable hours as much as possible.

It is not clear to us how contingency fees affect the incentive to litigate.<sup>411</sup> In some of the cases we have witnessed, contingency fees have facilitated access to justice, especially in high-cost litigation which requires the involvement of specialists. Also, there have been cases of multi-party disputes, in which the choice of contingency fees have facilitated settlements. Namely, in light of the long time required for a judgment to become final in Greece, the lawyers of claimants will often have an incentive to reach a quick out-of-court settlement. However, it is also possible that contingency fees may relate to the problems described above. For instance, we have witnessed cases regarding damages claims pursuant to car accidents, where contingency fees have been associated to the filing of unreasonably high claims. In this line of cases, contingency fees are very common. Since the defendant is almost always an insurance company with significant turnover, this can inflate the amount claimed by plaintiffs. However, since the picture regarding contingency fees is mixed, we hesitate to condemn the use of contingency fees in every case.

## **6. Funding**

Funding regarding actions for damages is not available in Greece. The Greek legislator has not predicted forms of funding for private enforcement litigation in competition law.

## **C. Labour Law**

Article 622 CCP (ex article 669)<sup>412</sup> grants certain procedural rights to professional associations in relation to labour disputes.<sup>413</sup> This provision covers professional associations of both workers (trade unions) and employers, which have acquired legal personality. Professional associations of either workers or employers, are ranked as first, second and third-level trade unions. All levels of professional associations may make use of the procedural rights laid down in Article 662 CPP. On the other hand, according to the widely-held view in the literature, the provision of article 622 should be

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<sup>410</sup> Article 59 of the Lawyers' Code

<sup>411</sup> Article 58 of the Lawyers' Code

<sup>412</sup> Pursuant to Law 4335/2015 (n 332), the provision of article 669 was renamed to article 622

<sup>413</sup> See articles 614(3) and 621 CCP

deemed to have been implicitly repealed in relation to professional chambers, pursuant to the Law 1876/1990.<sup>414</sup>

Article 622(1) CCP recognises the right of professional associations to initiate court proceedings, including applications for interim measures, for the protection of the rights of their members. The member of the professional association, in the interest of whom the latter has filed a law suit, might decide to file an individual suit, without being impeded by the pending law suit filed by the association. A professional association may not initiate proceedings, if the interested member has explicitly expresses their disagreement thereto. Court proceedings initiated under this provision, must arise either from a collective bargaining agreement or from provisions which are equated to a collective bargaining agreement; namely an arbitral award or a ministerial order. Trade unions do not have standing to sue for rights that arise from other sources, such as labour law or an individual employment contract stipulated between an employer and an employee. Should a trade union submit an action under this provision on the grounds of a right arising from an individual employment contract, then the court will issue a ruling of inadmissibility; if it, nevertheless, proceed to examining this action, its judgment can be appealed at the Supreme Court (article 559(14) CCP).

Furthermore, under article 622(2) CCP, professional associations may intervene in a trial between other parties, in support of their members, at any stage of the proceedings until a final judgment is issued. The pending trial in which the professional association intervenes, may relate to any claim and not only to rights arising from a collective bargaining agreement. Thus, a trade union might intervene in proceedings between an employer and an employee, in order to support the claim of its member for the payment of unpaid wages or for the declaration of the illegality of redundancies.

Finally, under article 622(3) CCP, professional associations may intervene in any trial which involves the interpretation and application of a collective bargaining agreement to which the professional association is a party. This right extends to any other provision which is equated to a collective bargaining agreement; i.e. a ministerial order which is binding for the intervening association or an arbitral award pursuant to an arbitration procedure wherein the intervening association participated. The procedural right set out in article 622(3) CCP serves the protection of the collective interest which depends on the outcome of the trial.<sup>415</sup> However, scholars have expressed scepticism for the utility of this procedural right, as the *res judicata* of the judgement is not automatically extended to a wider group of persons but is binding only for the parties to the *ad hoc* proceedings.<sup>416</sup>

It is obvious that the article 622 cannot qualify as a collective redress mechanism. First, a wide array of rules, such as those contained in individual employment contracts or legislative provisions, fall outside the scope of article 622(1) and 622(3). This seems hardly consistent with the apparent aim of these provision, which is the protection of workers. Thereafter, when mass

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<sup>414</sup> See Plevri in Ch Apalagaki (ed), Code of Civil Procedure: Interpretation of the Articles (4rd edn, Nomiki Vivliothiki 2016), art 622 (in Greek); K Kerameys/ D Kondylis /N Nikas (eds), Interpretation of the Code of Civil Procedure, art 669 (in Greek) ), both referring to K Papadimitriou 'Locus Standi of Professional Associations Pursuant to the Provision of Article 669(1) CCP' (June 1990) Diki p. 497 (in Greek)

<sup>415</sup> Areios Pagos (Supreme Court, Plenary Session) 8/2011 (NOMOS Legal Database);

<sup>416</sup> See See Plevri in Ch Apalagaki (ed), Code of Civil Procedure: Interpretation of the Articles (4rd edn, Nomiki Vivliothiki 2016), art 622 (in Greek); K Kerameys/ D Kondylis /N Nikas (eds), Interpretation of the Code of Civil Procedure, art 669 (in Greek).



harm situations arise, trade unions may not bring representative actions pursuant to article 622, but may only intervene in proceedings initiated by their members. This effectively reduces the utility of article 622 CPP as a mechanism for injunctive or compensatory collective redress. In the absence of a collective redress mechanism, the relief of the harmed persons depends on them bringing individual actions, which might or might not be joined under the rules on ordinary joinder of parties (article 74 CCP). In the past decade, Greek courts dealt with two high-profile cases regarding collective redundancies, which involved preliminary references to the Court of Justice of the European Union.<sup>417</sup> Both cases concerned the lawfulness of collective redundancies, which followed the termination of the activities of production units. As there were no collective redress mechanisms available under Greek law, the claims of the employees made redundant, in both cases, were submitted under the rules on ordinary joinder of parties. Moreover, in both cases there was a large number of plaintiffs. However, the law did not provide for a collective representative action, brought by a representative entity, whereas trade unions could only intervene in support of the plaintiffs. The lack of available collective redress mechanisms in those cases, significantly raised the cost of litigation and undermined the effective legal representation of the parties to the dispute.

#### **D. The 'Pilot Trial' in Administrative Procedural Law**

In 2008, the Greek Parliament introduced the mechanism of 'pilot trial' into the administrative procedural law.<sup>418</sup> This mechanism, which is based on the German model, provides an important procedural instrument, which facilitates the swift adjudication of administrative cases, whilst countering the risk of conflicting rulings. In particular, when a case pending before an ordinary administrative court relates to an issue of wider public interest, which affects a broad number of persons, the mechanism of pilot trial allows, under certain condition, this case to be referred to the Supreme Administrative Court (Council of State) for adjudication.<sup>419</sup> Should this happen, all trials pending before ordinary administrative courts, which involve the same crucial issue, are automatically suspended and the parties thereto can intervene in the proceedings before the Supreme Administrative Court. After the Supreme Administrative Court has ruled on the crucial issue it examined, it can refer the case back to the competent court. The judgment delivered by the Supreme Administrative Court is binding for the parties of the case which was adjudicated before it, including the intervening parties. Furthermore, this 'pilot' judgment, will pave the way for the subsequent development of the case law. This mechanism can potentially affect the outcome of court proceedings which involve a large number of persons. The judgement delivered by the Supreme Administrative Court ensures that courts faced with a legal issue of general interest will follow a consistent approach. Some Greek scholars, including the first of us, believe that such reform would constitute

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<sup>417</sup> Joined cases C-187/05 to C-190/05 *Agorastoudis and Others* ECLI:EU:C:2006:535, [2006] I-07775; Case C-270/05 *Athinaiki Chartopoiia* ECLI:EU:C:2007:101, [2007] I-01499

<sup>418</sup> See Article 39 Law 3659/2008 (Government Gazette A/77 7 May 2008) and subsequent amendments

<sup>419</sup> P D Dagtoglou, *Administrative Procedural Law* (6<sup>th</sup> edn, Sakkoulas Publications Athens-Thesaloniki 2014) 323; F Arnaoutoglou, *The pilot trial* (Nomiki Vivliothiki 2012); E Klouda, *The pilot trial* (Ant Sakkoulas 2013) (in Greek)

an effective solution for compensatory collective redress in the field of competition law.

## **E. Environmental Protection**

Greek Law contains a number of provisions in the area of private law for the protection of the environment. The Greek Civil Code (GCC) allows injunctive or compensatory redress through the provisions regarding the protection of personality (article 57 GCC). Claimants may also bring actions based on the provisions of the GCC on torts (article 914 GCC). Property law offers an additional legal basis for protection against 'emissions' (article 1003ff GCC). The legislator has introduced a special legal basis allowing plaintiffs to bring a compensatory claim on damages on the grounds of article 29 of the Law 1650/1986.<sup>420</sup> Finally, under the law on consumer protection, producers may be liable for any damages caused by their defective products, including damages arising from harm to the environment.

### **1. Standing**

Article 57 states that any person whose personality has been violated, has the right to claim that this violation is rectified and not repeated in the future. The term 'personality' encapsulated a wide array of features and values which comprise the essence of human nature. Therefore, the aim of this provision is to protect fundamental aspects of one's personality, such as their name, honour, beliefs etc. The law does not offer an exhaustive description of those aspects which fall within the umbrella of 'personality', as societal developments may render necessary to protect other aspects of one's existence by means of the article 57 GCC.<sup>421</sup>

Greek courts have accepted that this provision can provide the means for the protection of the environment. It should be noted that the environment is not protected per se under the provisions of the GCC. Nevertheless, it is accepted that the environment is a fundamental factor which affects the personality of individuals, as human beings' survival and development depends on it.<sup>422</sup> The environment is the natural space wherein individuals may participate in societal life.<sup>423</sup>

Moreover, under the provisions of the GCC (articles 966ff) many of the things that constitute the environment are protected as things 'common to all' and 'things destined for public use'. These concepts fall within a wider category of 'things falling outside of commerce'. The law recognises a right of individuals to 'use' (enjoy) collectively the things which are 'common to all' and 'destined for public use'. This right is inextricably connected to the personality of the individual.

The combination of the abovementioned provisions of the GCC ensures an adequate legal basis for the protection of the environment arising from the personality of the individual. According to article 57 GCC, two conditions must

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<sup>420</sup> Government Gazette A/160 16 October 1986

<sup>421</sup> Ioannis K Karakostas, *Civil Code: Interpretation - Commentary - Case Law, vol 1* (Nomiki Vivliothiki 2005), art 57

<sup>422</sup> Ioannis K Karakostas, *Environment and Law* (2<sup>nd</sup> edn, Ant N Sakkoulas 2006) 324

<sup>423</sup> Ioannis K Karakostas, 'Private Law for Environmental Protection' (2010) 58 *Nomiko Vima* 122, 123

be fulfilled in order for an individual to seek judicial protection on the grounds of the violation of their personality: 1) there must be a violation of one's personality; 2) this violation must be illegal. When these conditions are satisfied, a plaintiff may seek judicial protection on the grounds of article 57 GCC requesting that the violation is rectified or that the violation is not repeated in the future. Furthermore the plaintiff may submit a claim for damages, based on the provisions on torts (articles 57, 914 GCC), including a claim for non-pecuniary damages (article 59 GCC).

## **2. Law 1650/1986 for Environmental Protection**

Article 29 of Law 1650/1986 states that any legal or natural person who causes pollution or any other degradation to the environment, is liable to pay compensation for damages. Under this provision, any person who has caused harm to the environment, is liable to pay compensation for damages, even if they are not found to be at fault or negligent (system of strict liability). The system of strict liability constitutes the main advantage of this provision vis-à-vis the traditional rules on torts. The provisions on torts place an excessive burden upon the injured parties, who have to prove that the opponent party was at fault and furthermore that there is a causal link between the damages and the defendant's wrongdoing.

Despite the apparent advantages of this provision, plaintiffs have not yet brought forward any compensatory actions on the grounds of article 29 of Law 1650/1986. The inertia of this provision has to do with its vague wording, which renders its practical application very difficult. Moreover, it has been noted that the lack of case law is explained in light of the fact that plaintiffs in Greece initiate court proceedings before civil courts either as a precautionary measure to prevent harm to the environment or to seek injunctive relief.<sup>424</sup> On the contrary, compensatory actions in the field of environmental protection are rare.

## **3. Other Provisions of the GCC**

The provisions of the GCC on torts and property law may offer an additional legal basis for compensatory and injunctive relief pursuant to environmental harm. Plaintiffs may bring an action for damages based on the provisions on torts (article 914 GCC), when a harm to the environment violates a right or interest protected by law, such as their personality, property, life and health. Consequently, the claim for compensation will be calculated on the damages inflicted on those individual interests or rights.<sup>425</sup> Therefore, a compensatory action based on the grounds of torts might fail to capture the social cost of a harm to the environment.

In addition, property law includes a series of provisions which constitute the so-called 'neighbouring law', which may provide legal protection against 'emissions' (article 1003ff GCC). Article 1003 GCC sets out the conditions under which the owner of an immovable property has the obligation to tolerate the emission of smoke, soot, effluvia, heat, noise, vibration etc, which originate from a neighbouring property. In particular, these emissions must not unduly affect the first property and secondly they must emanate from an activity which is considered common for the location of the property.

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<sup>424</sup> *ibid*, p. 1928

<sup>425</sup> I Karakostas, 'Private Law for Environmental Protection' (n 96), p. 1923

When the limits circumscribed by the preceding conditions are exceeded, the owner of a property, which is negatively affected by emissions, may bring forward an action, requesting that this violation of their right to property is rectified and not repeated in the future.<sup>426</sup>

#### **4. Consumer Protection Law and Environmental Protection**

Under article 6(1) of the law on consumer protection, producers are liable to pay compensation for 'all' damages caused by their defective products. Furthermore, article 6(6)(b) of the law on consumer protection, states that the producer's liability covers any damage or destruction of any asset or property belonging to the harm consumer, including the 'right to use [enjoy]' the environment.

Moreover, article 8 of the law on consumer protection states that service providers are liable to pay compensation for 'all' pecuniary or non-pecuniary damages suffered by consumers by an act or omission of the former, which took place during the provision of services. In addition, the said action or omission must be illegal and the defendant service provider must be proven to be at fault. The preceding provisions offer a legal basis for consumers to claim compensation for environmental damages caused by producers or service providers for environmental damages.

#### **5. Collective Redress in Environmental Mass Harm Situations**

The starting point of the Greek legal order as regards judicial protection is that both administrative and civil courts require that plaintiffs have a concrete legal interest to seek judicial protection. Under the rules of civil procedure, a plaintiff may seek judicial protection before civil courts, insofar as they have a 'direct legal interest' thereto (article 68 CCP). The case law of the Council of State has accepted that a broad category of persons may justify legal interest in cases of environmental protection.<sup>427</sup> Individuals will be considered to have sufficiently demonstrated that they have a legal interest to initiate proceedings, if they can demonstrate proximity to the area which is harmed by the administrative act at issue. Moreover, associations having environmental protection as their objective, will be considered to have sufficient legal interest to initiate proceedings, even if they are not in proximity to the harmed area.<sup>428</sup> Therefore, individuals and associations have very often initiated proceedings before the Council of State, seeking the annulment of administrative acts relating to large projects of infrastructure. Contrary, the case law of civil courts is much more limited, albeit some civil courts have accepted that associations whose objective is environmental protection, may intervene in proceedings regarding the environment.

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<sup>426</sup> *ibid*, p. 1927

<sup>427</sup> Karakostas, *Environment and Law* (n 96 ) 664

<sup>428</sup> *ibid*

### **III. Impact of the Recommendation/Critiques**

The legal nature of the Representative Action is debated in the literature. According to one opinion,<sup>429</sup> when a consumer association files a representative Action, it exercises a (substantive) right belonging to it; therefore the consumer association is both plaintiff and the (legal) person entitled to the right, the protection of which is sought before a court. According to a different opinion, a consumer association which files a Representative Action, does not seek the protection of a right belonging to it; rather it has an exceptional form of legal standing, but this standing *'does not correspond to a right, interest or a claim belonging to it'*.<sup>430</sup>

#### **1. Abusive litigation in Consumer cases**

The announcement of inaccurate information to the consumers by a consumers association, as well as the violation of the stipulations of this law by the union, constitute reason for the: a) revocation of its certification; b) dismissal of its board of directors; c) interruption of its funding; d) removal of the union from the National Council of Consumer and Market ('ESKA') and from collective bodies; e) removal of the union from the Register. The law stipulates that the measures described under a), b), and d) of the above subparagraph can be requested within six (6) months from the date of the most recent violation or from the announcement of inaccurate information, by anyone who is negatively affected, every member of the union, every consumer union, the competent public prosecutor, the Hellenic Consumers' Ombudsman and the General Secretary of Consumers.

It has to be pointed out that consumers associations are held liable and are subject to penalties, when they file unfounded legal remedies against suppliers. When a consumer association has filed an action against a supplier which is clearly unfounded, the supplier is entitled to file an action for damages under article 10(23) of the Law on Consumer Protection against the consumer association and the members of its administrative board. Moreover, the court may order the dissolution of a consumer association if it has -either deliberately or in negligence- repeatedly filed actions for non-pecuniary damages, which have been dismissed by courts as manifestly unfounded. The dissolution may requested by a supplier that has been defendant in an unfounded action, or the public prosecutor.<sup>431</sup>

#### **2. Problems relating to access to justice in Competition claims**

Although the current trend is to place emphasis on the horizontal approach of collective redress mechanisms, it is equally true that competition law has particularities that should be taken into account. Substantive law difficulties, such as the passing-on of overcharges, the quantification of damages, the different treatment that different categories of harmed persons warrant

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<sup>429</sup> See E Alexandridou /Ch Apalagaki in E Alexandridou (ed), Consumer Protection Law (2015), p. 675ff

<sup>430</sup> See P Kolotouros, The subject matter of the stricto sensu group action, *ibid* (n 24) p. 1194 and the literature cited therein

<sup>431</sup> Article 10(29), Law on Consumer Protection

(consumers, SMES), other enforcement obstacles and the co-existence of public and private enforcement; all these are factors that require a different approach, which corresponds to the particularities of antitrust collective redress. The decision to promote the 'opt-in' principle, for the sake of private autonomy, does not ensure the effective application of competition law. In an opt-out system private autonomy can be secured either through the consumers' individual notification (with those not objecting being considered to have accepted the filing of the action) and by ensuring that consumers may ask to be excluded at any time, even after the decision has been delivered. In addition, the opt-out mechanism must necessarily be accompanied by strict notification conditions. Instead of prohibiting or ignoring the funding of representative entities, it should be preferable to monitor it. Likewise, if all amounts are not distributed, in the opt-out system case, an indirect restoration measure should be adopted with regard to the sum remaining. The total remaining sum as determined by the judge could be allocated to a group actions support fund for the financing of new proceedings or within a fund, which would provide pro-bono advice on instigating collective legal redress. Furthermore, the National Competition Authority should be empowered to act as a representative entity. This would facilitate the effective application of competition law.<sup>432</sup>

### **3. ADR**

The mediation mechanism should be promoted in the Greek legal system. It is compatible to Civil law principles and can constitute an effective and quick form of resolution of civil and commercial disputes. The Ministerial Decision no. 70330/30-6-2015 of the Minister of Economy regulates the alternative dispute resolution on consumers' protection cases. The above decision has implemented into Greek legal order the provisions of Directive 2013/11/EU on Alternative and Online Dispute Resolution. It is worth mentioning that this form of alternative dispute resolution does not bind the parties to the proposed solution. Under article 10(2) of this Ministerial Decision, every party may withdraw from this procedure at any stage of this process. In any case, at any stage of a civil trial the parties may resolve their dispute about compensation. It is at parties' discretion to reach an agreement about compensation before the case is discussed in court. This seems compatible to the sense of principles 25 and 28 of the Recommendation 2013/396/EU. There is no provision in Greek Law for collective alternative dispute resolution but in practice a consumer protection association may attempt to mediate the consumers' dispute.

## **IV. Information on Collective Redress**

The possibility for a representative entity or a group of claimants to disseminate information regarding alleged violations of EU rights faces challenges under Greek law. In particular, such dissemination of information on collective claims may violate the defendants' right to personal data and the right to protection of personality. The Courts decision *ex lege* is published as a public document.

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<sup>432</sup> A Mikroulea, *Collective Redress in European Competition Law*, (2016) ZWeR p.388

Anyone who will disseminate in public private documents like the document of claim may be liable to compensate the injured party, such as the defendant to a collective claim. The latter may file an action against the violator under 914, 932 and 57, 59 Greek Civil Code on torts. Nevertheless, in certain occasions there might be unofficial channels for dissemination of information on collective claims. For instance, as regards a series of recent Representative Actions brought by consumer associations in respect to loan agreements stipulated in Swiss franc (see Section V), the relevant consumer associations created and managed websites containing information on these claims. Furthermore, these associations encouraged consumers who had received loans in Swiss franc to contact the associations and intervene in the proceedings between the representative entities and the defendant banks, in support of the former.

There is no national registry of representative actions or other forms of collective actions. There is only a 'Registry of Consumer Associations', which is kept at the General Secretariat of Consumers (Ministry of Economy & Development).<sup>433</sup>

## **V. Case Summaries**

### **1. Loan Agreements in Swiss Francs**

In 2016, the Court of First Instance of Athens (multi-judge formation or 'Polimeles Protodikio') delivered the judgment no. 334/2016, following a Representative Action filed by consumer associations. The plaintiff associations claimed that the defendant, a major Greek bank (Eurobank-Ergasias), concluded loan agreements with consumers, which allegedly contained illegal general terms and conditions. The loan agreements in question were stipulated in Swiss franc (CHF). Consumers were required to repay these loans either in CHF or in euros (€), based on the exchange rate of the day that each instalment was repaid. However, after the significant appreciation of CHF vis-à-vis the euro in recent years, thousands of consumers could not service their borrowing.

The Court of First Instance of Athens, held that the general terms of conditions of these loan agreements, insofar as they stipulated that the loans would be granted in CHF, were not transparent and hence not legal. Therefore, it ordered the defendant to re-calculate the outstanding balance of the loans it granted, based on the exchange rates of the date that each loan was granted. The court didn't apply the 'loser pays principle' in that case, but ordered that each party should cover their own costs (articles 179 and 741 Code Civil Procedure), as it considered the 'interpretation of the invoked rule of law' too be particularly difficult in that case. The defendant has filed an appeal, which is scheduled to be discussed before the Court of Appeal of Athens on 28/9/2017.<sup>434</sup>

On 23/11/2016, the Court of First Instance of Athens (multi-judge formation or 'Polimeles Protodikio') heard another Representative Action, regarding loans stipulated in Swiss franc, which had a similar claim with the

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<sup>433</sup> Article 10(4) of the Consumer Act

<sup>434</sup> See the website of the 'Association of Borrowers in Swiss Franc' <<http://www.daneia-chf.gr/archiki.html>>

aforementioned. This Representative Action was filed by consumer associations against another major bank ('National Bank of Greece SA'). The Court, however, has not yet delivered its judgment on that case.

## **2. Special Duty on Property**

In 2011, as part of the country's efforts to achieve fiscal consolidation in accordance with the Economic Adjustment Programme, the Greek government imposed a special duty on properties which contained built surfaces having electricity supply.<sup>435</sup> The special tax was to be collected through the electricity bills paid by consumers. The law stipulated as a penalty for non-payment of this duty, the termination of electricity supply. Consumer associations filed a Representative Action against the main Greek electricity supplier (Public Power Corporation S.A. or 'DEI') at the Court of First Instance of Athens (multi-judge formation or 'Polimeles Protodikio'). The first instance court held that this law violates Article 4 of the Greek Constitution, which states that tax payers contribute to public charges in proportion to their means.<sup>436</sup> Furthermore, it held that the termination of electricity supply, which was the penalty for non-payment of the duty, unduly affects the private agreement concluded between consumers and electricity providers. Nevertheless, the court didn't apply the 'loser pays principle' but ordered each party to cover their own costs (article 179 Code Civil Procedure), in light of the difficulty of that case. Thereafter, the Greek government adopted legislative measures conforming to this court decision.

## **3. Supreme Court (Areios Pagos) 652/2010**

In the case which gave rise to the decision 652/2010 of the Supreme Court, a consumer association filed a Representative Action against a Greek bank, regarding the alleged illegality of various terms and conditions used by the bank in its transactions with consumers. The Court of First Instance of Athens (multi-judge formation or 'Polimeles Protodikio') and the Court of Appeal of Athens had already delivered their judgment on the Representative Action at issue. The parties to the proceedings both filed an application for the annulment of the judgment of the Court of Appeal of Athens (no 3499/2008), on different grounds, which were joined in the same proceedings.

The Supreme Court upheld several of the claims of the representative entity and dismissed others. For instance, one of the terms at issue stipulated that bank accounts with an average monthly balance, below a limit set by the bank, will incur extra charges. The Supreme Court found this term to be illegal and thus void. On the other hand, the Supreme Court held that the term according to which the bank could change the interest rate of credit cards, was legal and hence valid, under certain conditions. In particular, the bank can justifiably change the interest rates of credit cards within a specific margin, when the ECB increases the relevant interest rate. Furthermore, the Supreme Court held that the bank may take account of the risk and the market conditions and choose not to decrease the interest rates of credits cards, when the ECB decreases the relevant interest rate.

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<sup>435</sup> Law 4021/2011 (Government Gazette A/218 3 October 2011)

<sup>436</sup> Court of First Instance of Athens 1101/2012 (NOMOS Legal Database); See also Areios Pagos (Supreme Court) 293/2014 (NOMOS Legal Database), which upheld the decision of the first instance court.



Thereafter, the Supreme Court annulled the previous decision of the Court of Appeal (no 3499/2008). The Supreme Court did not apply the 'loser pays principle' but ordered each party to cover their own costs, as it held that both parties partially won and partially lost (articles 178 and 183 Code of Civil Procedure).

In 2011, the Deputy Minister of Labour extended the *res judicata* of this judgment to all suppliers, therefore banks cannot legally use terms and conditions similar to the ones found to be illegal, pursuant to this judgment of the Supreme Court.<sup>437</sup>

#### **4. Supreme Court (Areios Pagos) 2123/2009**

In the case which gave rise to the decision 2123/2009 of the Supreme Court, a consumer association filed a Representative Action against a bank, alleging that the bank used terms and conditions in its transactions with consumers, which were allegedly illegal. The Supreme Court held that the contract term, according to which consumers are liable to pay extra costs for transactions regarding withdrawals or depositing cheques above a certain limit, was illegal. Furthermore, the Supreme Court ruled that the contract term, regarding the payment of interest in loan agreements, was illegal. According to this term, the bank would deposit the amount of the loan in a special account but the consumers would not immediately have access to the entire amount. On the contrary, the amount of the loan would become available to the consumers gradually. Nevertheless, the bank would charge consumers with interest payments for the entire amount since the moment of depositing the loan, even though consumers would use only part of that amount.

The Supreme Court also accepted the pleadings of the bank, insofar as it claimed the Court of Appeal erred in relation to the claim of the consumer association regarding non-pecuniary compensation. In particular, the Court of Appeal issued an order of injunction, whereas the representative entity had filed an order for declaration. Therefore, the Supreme Court annulled the previous judgment of the Court of Appeal and referred the case back to it.

In respect to the costs, as both parties had won and lost to a different extent, the Supreme Court order the parties to pay costs as follows: the consumer association was ordered to pay €2,700 and the bank was ordered to pay €1,300. In 2011, the Deputy Minister of Labour extended the *res judicata* of this judgment to all suppliers, therefore banks cannot legally use terms and conditions similar to the ones found to be illegal, pursuant to this judgment of the Supreme Court.<sup>438</sup>

#### **5. Supreme Court (Areios Pagos) 430/2005**

In the case which gave rise to the decision 430/2005 of the Supreme Court, a consumer association filed a Representative Action against a bank, alleging that the defendant bank used illegal terms and conditions. The Supreme Court ruled that the term according to which the bank would calculate interests based the assumption that the year has 360 days (as opposed to 365) is illegal. Furthermore, it ruled that the contract term, according to which consumers were liable to pay compensation to the bank, if they repaid

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<sup>437</sup> See Ministerial Orders Υ Α Ζ 1-21/2011 (Government Gazette 21/ Β 18 January 2011)

<sup>438</sup> See Ministerial Orders Υ Α Ζ 1-21/2011 (Government Gazette 21/ Β 18 January 2011)

the entire loan before the stipulated contract duration, is illegal. The aforementioned term, concerned floating rate loans. Finally, it held that any term which made the premature repayment of the loan dependent upon additional cost incurred by consumers, is illegal.

On the other hand, the Supreme Court upheld the contract term according to which the bank could pass a special duty laid down by law (Law 128/1975) to consumers, ruling that this term is legal. However, despite this ruling of the Supreme Court, lower courts which subsequently ruled on individual actions, found that this contract term is illegal.<sup>439</sup>

In relation to costs, as both parties had filed two different applications for annulment, which were joined, and as both applications were partially accepted and partially dismissed, the Supreme Court ordered each party to pay €1,500 as costs.

It should be noted, that the Minister of Development issued a Ministerial order in 2008,<sup>440</sup> pursuant to article 10(21) of the Law on Consumer Protection, specifying the conditions under all suppliers must abide to this judgment of the Supreme Court. Hence, banks are prohibited from using the terms which were found to be illegal with this judgment of the Supreme Court, as well as any other similar terms.

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<sup>439</sup> Court of Appeal of Lamia 124/2007; Court of Appeal of Lamia 125/2007; Court of Appeal of Athens 1431/2004; Small Claims Court (Irinodikeio) of Athens 358/2011

<sup>440</sup> Ministerial Order Υ Α Ζ1-798/25-06-2008 (Government Gazette Β/1353 11 July 2008)

# HUNGARY – FACTSHEET

## Scope

Hungarian law does not provide for a specific horizontal collective redress mechanism.

Sectoral collective redress mechanisms are available in specific areas:

- unfair contract terms in consumer contracts (injunctive)
- consumer protection rules (injunctive and compensatory)
- competition law (injunctive and compensatory),
- banking/financial services (injunctive and compensatory)
- environment (injunctive)
- employment (injunctive)

The new Code of Civil Procedure, entering into force in January 2018, provides for rules on a sectoral collective redress mechanism (injunctive and compensatory) for claims arising from consumer contracts, from health damages caused by unforeseeable environmental incidents, and in labour cases.

## Standing (Para. 4-7)

Unfair contract terms in consumer contracts: the public prosecutor; the minister, or the head of any autonomous government authority, government office or central office; the head of the Budapest and county government offices; and professional chambers and organizations; consumer protection organizations established in any Member State of the EEA, the Hungarian National Bank (for banking related cases)

Consumer protection rules: the Consumer Protection Authority and consumer protection organizations.

Competition: Hungarian Competition Authority

Banking: Hungarian National Bank and the consumer protection organizations

Environment: organizations established for the protection of environment and by the public prosecutor

Employment: public prosecutor, the public authority, and relevant non-governmental civil societies..

## Admissibility (Para. 8-9)

The court examines the admissibility of the claim and, where compensation is available (consumer, competition, financial services), if the amount of damages can be clearly defined.

## Information on Collective Redress (Para. 10-12, 35-37)

The court will decide on the format of the publication, usually in a newspaper of national significance and online.

## **Problems/Incompatibilities with Recommendation principles**

There is no national registry.

The channels for dissemination of information on collective claims are not effective.

## Funding (Para. 14-16)

There are no special rules on funding collective actions. Consumer protection organizations are funded on yearly basis by the Government; these funds can be used for financing collective actions but there is no specific, targeted funding for collective actions.

### **Problems/Incompatibilities with Recommendation principles**

There are no legal obstacles for a third party funding but it has not yet been used in practice.

#### **Cross Border Cases (Para. 17-18)**

There are no specific restrictions as to the participations of foreign claimants.

For consumer claims, standing is given to any consumer protection organization established in the EEA registered with the EU Commission.

#### **Expedient procedures for injunctive orders (Para. 19)**

For consumer claims, the court may order interim measures if necessary to prevent an immediate harm, provided the measure is proportionate.

### **Problems/Incompatibilities with Recommendation principles**

Collective actions are conducted in an ordinary civil procedure, and summary proceedings are not available except in the sector of financial services.

#### **Efficient enforcement of injunctive orders (Para. 20)**

Regular enforcement procedure applies.

### **Problems/Incompatibilities with Recommendation principles**

There are no sanctions in place to secure voluntary compliance with the judgment.

#### **Opt In/Opt Out (Para. 21-24)**

Where compensation is available (consumer, competition, financial services), if the amount of the claim can be clearly defined, then the compensatory mechanism follows an opt-in system. Affected consumers can join the claim up until the closure of the hearing preceding the first instance judgment.

Otherwise, the court issues a decision on liability, and compensation relies on the initiative of each individual consumer.

Regarding injunctive mechanisms in the other sectors, there is no opting in or out: the claim is made in the general public interest.

#### **Collective ADR and Settlements (Para. 25-28)**

Hungary has two out-of-court ADR schemes specifically designed for the resolution of consumer to business disputes.

### **Problems/Incompatibilities with Recommendation principles**

In practice, most of the cases regard unfair contractual terms, and court directed settlements before or during the civil procedure are not available in that sector.

#### **Costs (Para. 13)**

The 'loser pays' principle applies.

Consumer protection organizations, the public prosecutor and the Hungarian National Bank are exempted from paying court fees.

**Lawyers' Fees** (Para. 29-30)

Contingency fees are possible but not common in practice.

**Prohibition of punitive damages** (Para. 31)

Punitive damages are not available.

**Collective Follow- on actions** (Para 33-34)

In theory, it is possible to rely on an injunction for a follow-on collective action, but it has never been done in practice. Following an injunction, affected consumers bring individual compensation claims.

**Interplay between injunctions and compensation across all sectors**

Where compensation is available (consumer, competition, financial services), injunction and compensation can be combined in one single action only if the group of affected consumers and the amount of their damages is clearly identified.

# HUNGARY – REPORT

## I. General Collective Redress Mechanism

There is no horizontal collective redress mechanism in Hungary.

## II. Sectoral Collective Redress Mechanisms

### A. Collective Redress Mechanism under the Civil Code

#### 1. Scope/ Type

Injunctive Relief against unfair contract terms in consumer contracts.

#### 2. Procedural Framework

Special procedural rules are laid down in Act V of 2013 on the Civil Code, general rules are in the Act III of 1952 on Civil Procedure (CPA). It should be noted that the CPA will cease to be in force from 1 January 2018 when the new CPA (Act CXXX of 2016 on Civil Procedure) will be applicable. The report will refer to these rules where appropriate.

##### a. Competent Court

The competent court for handling unfair contract terms disputes in consumer contracts are the regional courts (törvényszék) (Section 23 paragraph 1 CPA).

Based on Section 30/A CPA the competent regional court is determined based on the place of temporary or permanent residence of the claimant. In the absence of a Hungarian place of residence, the competent regional court will be determined based on the place of residence or place of business of the defendant. This is an exception from the general rule that the competent court is determined based on the place of permanent or temporary residence, or place of business of the defendant. In the absence of Hungarian residence, the competence of a court is determined based on the permanent or temporary residence, or place of business of a claimant (Section 29 para 1 CPA).<sup>441</sup>

Under the new CPA the competent court (Section 20 CPA), and the general rule on the place of competent court remains unchanged (Section 25 paragraph 1 CPA), however, there are exceptions in place for consumer transactions. According to Section 26 paragraph 1 in any procedures commenced by business against consumers the exclusive competence of the

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<sup>441</sup> This is an exception from the general rule (see below under A), that has interestingly been justified by judicial case management reasons rather than compliance with EU law and its consumer protection framework (i.e. Brussels I Regulation). Namely, a large number of claims against banks involving unfair terms in foreign currency loans submitted to the Municipal Regional Court given that the seat of most banks overburdened this court that resulted in delayed solutions, and justice. See Commentary to Section 30/A in Új jogtár online database, Wolters Kluwer, at <http://uj.jogtar.hu/az-uj-jogtarrol>

court by the place of temporary or permanent residence or the last known residence of the consumer (Section 26 paragraph 1 CPA). In case of disputes commenced by consumers against businesses, consumers are given a choice to opt for the court of their residence (Section 28 paragraph 1, subparagraph d) CPA).

**b. Standing**

Section 6:105 of the Civil Code confers standing on the public prosecutor; the minister, or the head of any autonomous government authority, government office or central office; the head of the Budapest and county government offices; and professional chambers and organizations; consumer protection organizations established in any Member State of the EEA (Section 6:105 Civil Code)

Standing of the Hungarian National Bank is established by Section 164 paragraph 9 of the Act CXXXIX of 2013.

**c. Availability of Cross Border collective redress**

Cross border redress is available, given that Section 6:105 confers standing on consumer protection organizations established in any EEA Member State.

**d. Opt In/ Opt Out**

Collective actions against the use of unfair terms in consumer contracts are representative actions; this means that the claimant is the entity empowered by Section 6:105 of the Civil Code (see above under: standing), and acts in the general interest of consumers. Affected consumers can join the claim up until the closure of the hearing preceding the first instance judgment (Section 64 paragraph 3 in connection with Section 54 paragraph 1 CPA) – opt-in.

**e. Main procedural rules**

Currently there are no special procedural rules; the general rules in the CPA apply.

Courts are empowered to decide within the boundaries set by the claim (Section 3 paragraph 2 CPA); the general burden of proof applies, i.e. the burden of proof is on the party that is interested that the court accepts the truthfulness of the fact (Section 164 CPA). There are some exceptions from this general rule when the court may decide on a question *ex officio*, for example, the court may decide *ex officio* on the nullity of the contract (Section 6:88 Civil Code). Based on Opinion 2/2010 of the Supreme Court, court cannot collect evidence *ex officio*. Courts can therefore decide on nullity *ex officio* only in case of straight forward factual situation that does not require the collection of additional evidence.

These cases are decided in an ordinary civil procedure; there are no special rules on case-management, deadlines or expediency. Summary proceedings are not available.

Interim measures are available under the general rules of the CPA (Section 145 paragraph 1). Upon its discretion, the court may order interim measures if it is necessary for preventing an immediate harm or for maintaining the situation that gave rise to the dispute, or if it is necessary for the protection of the claimant, provided the measure is proportionate. The party seeking interim measures must prove their necessity on the balance of probabilities. The court may require securities for interim measures.

Court directed settlement before or during the civil procedure is not available (Section 8 paragraph 6 provides that mandatory mediation should be foreseen by a separate statute, and this is not foreseen by the Civil Code).

The new CPA that will apply on disputes commenced following 1 January 2018 contains a chapter on special procedural rules for court actions commenced in public interest (XLII chapter). It should be highlighted that the current CPA contains no special rules for public interest actions.<sup>442</sup>

Should the complexity of the dispute require, and upon the discretion of the delegated single judge, public interest actions may be decided in a panel of three judges (Section 573 para 1)

Consumers in whose interest the action is commenced are not considered parties in the dispute (Section 573 para 2)

The claim must determine the circle of consumers affected by the infringement and must determine the way in which consumers will be able to show that the judgement applies to them or that they are entitled for compensation once it is rendered (Section 574 para 2). However, even if the amount of compensation or the entitlement to compensation cannot be determined for the entire group, a claim seeking declaratory judgment can be still submitted provided the legal situation that should be clarified can clearly be determined (Section 574 para 3).

In terms of procedural expediency, the new CPA provides that there is no room for interference in these actions (Section 573 para 3). Courts can join claims that are commenced independently against the same business, and that have the same circle of consumers and consumer rights sought to be enforced (Section 576).

### **3. Available Remedies**

Injunctions: under Section 6:105 the court will determine that a term is unfair, it will annul the term and decided on the way in which the judgment will be published

These injunctions have a quasy erga omnes effect - 'quasy' because the effect of court decisions establishing the unfairness of a term is extended to all contracts of a business concerned; but only to those that have not yet been performed and has not influence on contracts of other businesses containing similar or the same terms.

The court can scrutinize the fairness of a contract term in three distinct situations. First, when the term has been previously used. Under Section 6:105 paragraph 2, the court is able to annul the term with a (quasi) *erga omnes* effect, reaching every contract (except those that have already been performed) concluded by a particular business (failing to reach contracts using the same term drafted by other business entities). Secondly, based on Section 6:105 para 3, an action may also be taken against a business that has drafted and published the particular term but not yet used in practice. The court will issue an order to stop the business from using the term in the future. Again, the effect of the judgment is against the particular business and a particular term. Finally, under Section 6:105 para 4, an action may also

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<sup>442</sup> The terminology used 'közérdekből indított per' suggests that the rules are applicable for both types of collective actions in public interest, i.e., public interest actions, and public interest enforcement, as explained under A.



be taken against the business that did not draft or use an unfair contract term, but made a public recommendation for its usage, for example, when the term has been drafted by professional chambers or organizations.<sup>443</sup> In this case the court will stop the business from using the particular term in the future (the judgment extends to a particular business and a particular term).

The general limitation period of 5 years applies for contractual claims (Section 6:22)

In addition for the term being declared null and void, the court may order the publication of the judgment. Publication must be made on the expense of the business. The text and method of publication is determined by the court; but the publication has to specify the exact wording of the term, a declaration of its unfairness, and the reasons for its unfairness (Section 6:105 para 2 Civil Code). The Civil Code does not specify the space of publication. Opinion of the Supreme Court that has been codified in this provision mentioned the possibility of online publication<sup>444</sup> and the case studies below point on publication in newspapers.

#### **4. Costs**

The basic rule in governing costs is the loser pays principle (Section 78 paragraph 1 of CPA). This will be maintained in the new CPA (Section 577 para 2).

The CPA has a special rule for a situation where the claim initiated by a public prosecutor, a consumer protection organization, or a claimant empowered to initiate collective actions by a separate legislation (arguably such as the Hungarian National Bank) – in this case costs of the process are born by the State (Section 78 para 3 of CPA)

Consumer protection organizations, the public prosecutor and the Hungarian National Bank are exempted from paying court fees (Section 5 paragraph 1 subparagraph b of Act XCIII of 1990 on Fees).

#### **5. Lawyers' Fees**

Contingency fees are possible but not common in practice.

#### **6. Funding**

There are no special rules on funding collective actions; therefore in theory funding can originate from public, private and third party resources. There do not seem to be any legal obstacles for third party funding but it has not been used in practice.

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<sup>443</sup> Commentary on the relevant section of the old Civil Code in Complex Jogtár-online database (database no longer available)

<sup>444</sup> Opinion 3/2011 of the Civil Chamber on questions on collective actions regarding consumer contracts, point 7 at <http://lb.hu/hu/kollvel/32011-xii-12-pk-velemeny-fogyasztoi-szerzodesselel-kapcsolatos-kozerdeku-kereset-elbiralasanak>

Consumer protection organizations are funded on yearly basis by the Government; these funds can be used for financing collective actions but there is no specific, targeted funding for collective actions.<sup>445</sup>

## **7. Enforcement of collective actions/settlements**

These are pure injunctions; they end with declaratory judgments that a term is unfair and therefore null and void. Null and void terms have no legal effect, but the contract contains to be valid provided it can exist without the null and void term.<sup>446</sup> Stemming from the nature of nullity it can be implied that the business will remove the unfair (and null and void term) from the contract and refrain from using it in the future, or that it will stop recommending the terms in question.

Publication of the judgment should secure consumer information and awareness that a judgment has been rendered.

Consumers do not get compensated, any damages claim needs to be realized in a subsequent and separate court process, individually by consumers in an ordinary civil procedure.

In line with the requirements in Section 574 of the new CPA, the judgement should contain the circle of consumers affected by the judgment and the way in which they are able to prove that their belonging to this circle (Section 577). Unlike the present situation when it is somewhat unclear how the affected consumers are notified that the judgment is rendered and that they are affected by it, the new CPA contains detailed rules in this regard. It confers an obligation on the business involved in the collective action to notify affected consumers (i.e. its customers) individually within 30 days in writing following the judgment. They must inform consumers that a judgment has been rendered and that a consumer is affected by it. Following this notification a consumer loses its right to commence an individual court action in the same matter, unless the consumer in question notifies the business within 60 days that he/she wishes to reserve the right for commencing individual actions.

## **8. Number and types of cases brought/pending**

In the absence of official statistics on collective actions it is impossible to say the exact number of cases that have finished or that are pending. There is however a relatively large number of cases, for example one study is based on 90 cases that have been examined, this study has found that 54 cases involved the issue of unfair contract terms.<sup>447</sup>

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<sup>445</sup> Andrea Fejős, Study to support the Fitness Check of EU Consumer law – Country report Hungary, in Study for the Fitness Check of EU Consumer Law and Marketing Law, Final report Part 3 – Country reporting, 2017, p. 538, at [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=59332](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332)

<sup>446</sup> 6/2013 PJE Decision (decision of the Supreme Court on the unified application of civil law), point 5 at <http://lb.hu/hu/joghat/62013-szamu-pje-hatarozat>

<sup>447</sup> Gelencsér (footnote 1)

## **9. Impact of the Recommendation/Problems and Critiques, including**

### **a. Impact of the collective mechanism (or lack of) on behaviour/ policy of stakeholders (direct/ indirect, economic/social impact)**

Overall, the effect of collective actions on unfair terms is not reflected on the behaviour of businesses. The problem is not specific for these type of actions though; collective actions in general, all types taken together, have a marginal effect on the behaviour of businesses.<sup>448</sup>

The problem with the remedy for using unfair contract terms is the insufficient preventive effect of the judgment. The judgment has a *quasy erga omnes* effect, ie. it extends to a particular business and a specific term – it does not reach other businesses using the same term or other very similar terms of the business concerned. For the annulment of these a separate court action must be commenced. The effect of these judgments therefore remains very limited.

Although the aggregate number of collective actions would suggest a fair amount of these types of litigations, in practice however, this number has been boosted by collective actions mandated by Act XXXVIII of 2014 (as explained below), and in practice there are not as many collective actions as there could be. Consumer protection organizations on average commence 4-5 disputes per year, and the number is even lower for public authorities.<sup>449</sup>

It should be noted that collective actions are more effective as preventive tool, where the power to commence collective actions is used by qualified entities to strengthen their negotiation position with the business in order to initiate a change in the businesses behaviour. Disputes are resolved in most cases by negotiation, with the threat of the injunction in the background. For example, the Hungarian National Bank persuaded financial firms to changing their standard terms and conditions following its notice in vehicle financing contracts.<sup>450</sup> Consumer protection organizations also experienced the positive response from businesses. Online shops have modified their standard terms and conditions following the commencement of injunctions procedures. They have negotiated with the organization after they have received the claim, and modified their terms before the end of the process.<sup>451</sup>

### **b. Incompatibilities with the Recommendation's principles**

Incompatibility with Point 4 of the Recommendation: consumer protection organizations as qualified entities have no sufficient resources to conduct collective court actions (as explained above)

Point 7: some public authorities have no competence to commence collective court actions at all, for example the National Media and Infocommunications Authority, whereas some do not have competence to commence public interest actions against the use of unfair terms such as the consumer Protection Authority<sup>452</sup>

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<sup>448</sup> Compare Fejős (footnote 7), p. 535

<sup>449</sup> Ibid

<sup>450</sup> Tamás Babai-Belánszky, Unfair general contract terms in the field of vehicle financing - Tisztességtelen általános szerződési feltételek a gépjármű finanszírozás körében, Vol. 12, Special issue no. 3 Versenytükr, 2016

<sup>451</sup> Fejős (footnote 7), p. 536

<sup>452</sup> Fejős (footnote 7), p. 538

Points 10 and 11: dissemination methods are not effective

Points 14-17: there are no legal obstacles for a third party funding – although this option has not yet been used in practice

Point 19: collective actions are conducted in an ordinary civil procedure, summary procedure is not available

Point 20: there do not seem to be effective sanctions in place, in fact, they do not seem to be any sanctions in place to secure voluntary compliance with the judgment

Point 21: these actions are opt-out

Point 25-28: court connected, or court encouraged mediation is not available for collective disputes

Points 35-37: there is no national registry on collective actions

Point 39: there is no evidence on the collection of national annual statistics on collective actions (general court statistics are available, but these do not separate out collective actions, or at least, they do not do it in a transparent and accessible way).

### **c. Problems relating to access of justice/fairness of proceedings**

The costs of the procedure represent a serious obstacle for consumer protection organizations to take up the risk of these litigations. Although these organizations are exempted from paying court fees, lawyer's fees must be covered and legal representation is mandatory. Disputes can last up to 3-4 years and generate such an expense that can force the organization into bankruptcy. The more expensive (and expert) the lawyer is that represents the business entity, the more of a deterrent it is for consumer protection organizations to go ahead with the case.<sup>453</sup>

The absence of sufficient funds of consumer protection organizations suggests that public authorities are much better placed to commence these disputes; these authorities however face a distinct problem of lack of competence. For example, the general authority for pursuing consumer protection is the Consumer Protection Authority lacks competence for the protection of consumers' contractual interests.<sup>454</sup>

Although in theory there may be many benefits for publication of the judgment, such as informing future actions of qualified entities or future actions of business that could voluntarily modify their terms, or to inform consumers that a judgment has been rendered that had conferred important rights on them, the publication of judgments in Hungary has no notable effects. In practice, these have been ineffective, and it neither educated consumers to look out for unfair terms nor alerts businesses to remove similar terms from their contracts.<sup>455</sup>

Finally, the enforcement of these judgments may also hinder consumers' access to justice. Businesses should voluntarily comply with the judgment. In the absence of voluntary compliance the law remains unclear, neither the Civil Code nor the CPA contain special provisions on whether an affected consumer has a right to enforce the judgment, or whether this right is only provided for the claimant in the dispute, the representative entity. In any

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<sup>453</sup> Ibid

<sup>454</sup> Ibid

<sup>455</sup> Ibid

case, enforcement must go through the regular enforcement procedure laid down in Act LIII of 1994 on court enforcement. Lastly, harmed consumers are not getting compensated; any damages claims had to be realized in a separate civil procedure. Although the Civil Code makes no reference for easing the burden of proof for consumers, that they only need to show the causal link between the use of the unfair term in question and the damages that they have suffered (as for example does the Act CLV of 1997 – see below), however, most probably consumers are able to rely on the judgment establishing the unfairness of a term to claim damages, and they do not need to prove again that a term is unfair. However, the law remains unclear on this point.

## **B. Collective Redress Mechanism under the Consumer Protection Act**

### **1. Scope/ Type**

Act CLV of 1997 on Consumer Protection differentiates two types of collective actions conducted in the protection of public interest. One could be translated as public interest action (közérdekű kereset) regulated by Section 39 and the other as public interest enforcement (közérdekű igényérvényesítés) laid down in Section 38. The difference between the two is that the latter requires a prior administrative decision that has established the infringement.

Based on Section 39 paragraph 1 public interest actions can be commenced regarding any breach of the consumer protection rules that falls under the competence of the courts (although no specific mention, public interest actions against unfair contract terms should be exempted as they are governed by the Civil Code, as explained above under A).

Based on Section 45/A paragraphs 1 to 3 in connection with Section 81 paragraph 1 public interest enforcement can be commenced following the administrative decision of the Consumer Protection Authority establishing the infringement of a wide range of consumer protection rules, i.e. distribution and the provision of services; protection of children and minor consumers; consumer credit groups; in relation to the operation of complaint handling, customers services or consumer protection rapporteur<sup>456</sup>; the businesses information obligation related to the consumers' right to resolve their disputes in front of Consumer Arbitration Boards, and the businesses obligation to participate in the ADR process upon the initiation of the consumer (so called obligation to cooperate with the consumer – együttműködési kötelezettség); unfair commercial practices; marketing of goods; quality, composition and packaging of goods; measurement of goods on sale or intended for sale, government or other regulated price; guarantee and warranty rights; equal treatment in marketing goods or services; information of consumers.

Both types of actions are injunctive and compensatory.

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<sup>456</sup> See for the explanation of these Fejős (footnote 7), p. 518-19

## **2. Procedural Framework**

Special procedural rules are laid down in Act CLV of 1997 on Consumer Protection; these should be read together with the general procedural rules in the CPA.

### **a. Competent Court**

These cases are decided by District Courts (Járásbíróság).<sup>457</sup>

### **b. Standing**

Under Section 38 paragraph 1 standing to sue is given to the Consumer Protection Authority (Fogyasztóvédelmi Hatóság) and consumer protection organizations.

Under Section 39 paragraph 1 standing to sue is conferred on consumer protection organizations and the public prosecutor.

### **c. Availability of Cross Border collective redress**

Based on Section 38 paragraph 8 cross border collective redress is available. Standing is given to any consumer protection organization established in the EEA registered with the EU Commission based on Section 4 paragraph 3 of Directive 2009/22/EC, provided that the infringement of EU law occurred in regard to any of the matters that fall under the competence of the Competition Authority under Section 45/A of Act CLV of 1997 (as explained above).

Based on Section 39 paragraph 2 standing to sue is given to any consumer protection organization established in the EEA that are registered with the EU Commission based on Section 4 paragraph 3 of Directive 2009/22/EC.

### **d. Opt In/ Opt Out**

The model is not specially categorized in Act CLV of 1997 as either opt-in or opt-out, given that no express consent is required from consumers. If the amount of the claim can be clearly defined, then the compensatory action will follow an opt-in system. If the amount cannot be defined, then the court will render a decision on liability, and enforcement will be in the hands of individual consumers.

The existence of a collective action does not deprive consumers to commence individual actions in regard to the same subject matter (Section 38 para 7, Section 39 para).

### **e. Main procedural rules**

Currently there are no special procedural rules; the general rules in the CPA apply (as above under A) with the above clarifications in the Act CLV of 1997

Under 39 para 1 public interest actions can be commenced against a business that has harmed a large, identifiable group of consumers, whose personal identity is not known, or that has caused significant disadvantage, provided the matter falls under the courts' competence. Under Section 38 para 1 public interest enforcement is conditioned upon the prior administrative process that has established the infringement, and a large number of consumers being

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<sup>457</sup> See Gelencsér (footnote 1).

affected by the infringement the circle of which can be determined at the time of submitting the claim. The commencement of these actions is therefore not conditioned upon the consent of affected consumers.

Public interest actions are single or two staged; should the consumers decide to claim compensation, this must be realized in a separate action, and thus the process will be multi staged. Public interest enforcement are two staged actions; the court process is preceded by the administrative process that has established the infringement.

For everything else, the general rules of the CPA apply, as above under A.

### **3. Available Remedies**

The remedies are injunctions (alone or with the restitution order) and damages.

Both public interest actions (Section 39) and public interest enforcement (Section 38) can have various outcomes:

Under Section 39 para 3 the process ends with a declaratory judgment establishing the infringement (without ordering to stop the infringement). In this case consumers need to realize their damages claim in a separate process, only needing to prove the amount of damages suffered and the causal link between the infringement and their damages. In addition, the process can also end with a cease and desist order alone or with a case order accompanied with a restitution order, which is an order to restore the situation to the way it was prior to the infringement. Section 39 therefore gives a possibility to rely on the injunction in a separate follow on individual action for damages. Apart from these independent remedies for public interest actions, the remedies under Section 38 (as explained below) are also available. It is therefore possible to claim damages compensation within public interest actions.

Under Section 38 option is to ask for a declaratory judgment that determines an infringement has occurred. The court will then identify the group of consumers affected by the judgment. Any injured consumer within the group may submit a separate claim for damages, only needing to prove the causal link between the infringement and damage and the amount of damages suffered. In addition to asking for an injunction, enforcement authorities can also seek damages or specific performance of the outstanding contractual obligation, provided the amount of damages or the content of specific performance is determinable. Under Section 38 therefore injunction and damages can be combined in one single action.

Act CLV of 1997 makes no mention of methods for allocation of damages between claimants; in practice it seems that after being informed that a particular judgment has been rendered consumers should contact the business to claim compensation (see below).

Limitation period: Section 38 paragraph 2 provides a 3 year limitation period for public interest enforcement claims, without counting the duration of the administrative process in front of the Consumer Protection Authority. Section 39 is silent on limitation period; it can therefore be assumed that the general rule of the 5 year limitation period for contractual claims in the Civil Code applies.

As a matter of general rule, punitive damages are not available.

#### **4. Costs**

As above under A

#### **5. Lawyers' Fees**

As above under A

#### **6. Funding**

As above under A

#### **7. Enforcement of collective actions/settlements**

Businesses must voluntarily comply with the award of damages or specific performance in the absence of which Section 38 para 5 specially empowers affected consumers to enforce the judgement. Although the act is silent in regard to consumers' rights for court enforcement this most right most likely entitles consumers whose rights are affected by judgments rendered based on Section 39.<sup>458</sup>

Once decided to enforce their rights, consumers need to follow the regular enforcement procedure laid down in Act LIII of 1994

Enforcement of collective actions for damages depends on consumers. Consumers should get in touch with the business to claim compensation. Effective enforcement therefore depends on the information of consumers that a judgement has been rendered and on the willingness of consumers to claim compensation.

#### **8. Number and types of cases brought/pending**

Actions for damages are used very rarely in practice due to obstacles explained below. Although there is no official statistics on the number of these cases, the above mentioned study found 9 cases involving this act.<sup>459</sup>

#### **9. Impact of the Recommendation/Problems and Critiques, including**

##### **a. Impact of the collective mechanism (or lack of) on behaviour/policy of stakeholders (direct/ indirect, economic/social impact)**

As above under A

##### **b. Incompatibilities with the Recommendation's principles**

As above under A.

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<sup>458</sup> Explanatory notes on Section 39 Act CLV of 1997 in Új Jogtár.

<sup>459</sup> Gelencsér (footnote 1)



### **c. Problems relating to access of justice/fairness of proceedings including**

Collective actions for damages compensation are very rare in practice, due to procedural obstacles that the submission of the claim is conditioned upon, i.e. these are the difficulty of identifying the circle of affected consumers and the amount of damages suffered by consumers.<sup>460</sup>

In practice the fact that consumers should contact the business to claim compensation following compensatory actions is an obstacle for consumers' effective access to justice. In the absence of sufficient media attention, and given the apparent ineffectiveness of publication of judgments, and in the absence of sufficient funding for consumer protection organizations to conduct information campaigns consumers often stay uninformed that a judgment has been rendered and that they have a right to claim compensation.

However, even if consumers are informed on their rights, the low values of compensation may deter consumers from going through the trouble of claiming compensation. For example, in the well-known 'yellow cheque' case (see below), only around 5% of consumers claimed compensation from the company.<sup>461</sup>

Finally, consumers' access to justice may be hindered by the rules on enforcement. In the absence of voluntary compliance by the business, consumers can enforce the rights conferred upon them by the judgment. However, at this point enforcement becomes individual, as it would have been following an individual court action diminishing the advantages of a collective action. The absence of effective sanctions against non-compliance raises the likelihood of non-compliance and consumers' need for individual enforcement.

Finally, the act does not mention though up to what point consumers are entitled to commence a separate civil action in regard to the same subject matter as the collective action, whether this is only up to the final judgment in the collective action, or whether this right is also conferred on consumers following the judgment.

## **C. Collective Redress Mechanism: group actions under the new Civil Procedure Act**

### **1. Scope/ Type**

Sectoral: claims arising from consumer contracts, from health damages caused by unforeseeable environmental incidents, and in labour cases

Injunctive and compensatory

### **2. Procedural Framework**

The procedural framework is set out in Act CXXX of 2016 on Civil Procedure.

#### **a. Competent Court**

Based on Section 582 para 1, the competent courts are the regional courts.

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<sup>460</sup> Fejős (footnote 7), p. 538

<sup>461</sup> Fejős (footnote 7), p. 535

## **b. Standing**

Group actions are commenced by a group of at least 10 claimants (Section 583 para 1). These actions have been introduced to enable claimants to jointly enforce their rights, given the limitation of public interest actions and public interest enforcement can only be commenced for the protection of public interest and are therefore limited by the presence of public interest.<sup>462</sup>

## **c. Availability of Cross Border collective redress**

Not available.

## **d. Opt In/ Opt Out**

Opt-in model.

## **e. Main procedural rules**

Group actions must be authorized by the court. Courts will authorize these actions if claimants can show that one or more of their rights have been infringed (i.e. representative right) and that the claim is based on the same factual ground (i.e. representative facts) (Section 583 para 1)

The authorization must be sought in the claim. The new CPA provides detailed rules as to the content of the claim in Section 584. The claim must contain the names of joint claimants and the reason for their joinder. The claim must name one claimant as the representative claimant (and its deputy) that will undertake procedural actions in the name and on behalf of the group. Further on, the name of the legal representative; the representative right; the representative facts. Claimants must also determine the way in which the court will be able to determine that the claimants are connected by the infringement of a right based on the same set of facts that brings about their entitlement for the representative right (i.e. claimant's connectedness). In addition, claimants must point onto and submit a *group action contract* (társult perlési szerződés).

The group action contract must be concluded before the request for authorization, and its content is laid down in detail in Section 586 para. 1. Apart from naming the claimants, the representative claimant (and its deputy), and the legal representative of the group, the contract must also contain the way in which the costs of the process will be borne by the group, the way in which claimants will supply the necessary evidence and other documents in the process, rules on the liability of the representative claimant, whether new claimants can join the claim or whether existing claimants can exist the process, agreement relating to the possibility of reaching settlement, whether the representative claimant must seek approval from the group before undertaking procedural actions, the way in which the representative claimant will inform the rest of the group on the development of the process, a declaration that following the end of the process – whether it is a judgment or a settlement – every claimant will be compensated proportionately to the amount of their claim, and the ways in which the contract can be ended. It should be highlighted that the provision on the distribution of the proceeds of the claim is mandatory (para 2); and that courts will not control whether the representative claimant respected what has been agreed.

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<sup>462</sup> See to this effect: Kúria (then Supreme Court), decision no. Pfv. VIII. 21.007/2008 (reported in BH no. 2009.246).

In the absence of these elements the court will reject the claimants request for a group action (Section 586 para 3).

There is a special right to appeal against the decision that reject authorization, the appeals of which second instance courts must decide within 30 days (Section 585)

New claimants can join the claim, provided this is expressly provided for in the group action contract, there must be a request for the joinder of a new claimant and this must be authorized by the court. Courts will authorize the joinder of new claimants only when this would not require the repetition of crucial procedural actions (Section 587 para 1)

Procedural rights are conferred on all claimants jointly and can only be exercised jointly. The right to exercise these rights is conferred on the representative claimant with the group action agreement (Section 589)

The admissibility of these claims is limited by subject matter to contractual rights of consumers, some labour disputes and some environmental disputes (Section 583 para 2).

Should the complexity of the dispute require or its significance for the society, and upon the discretion of the delegated single judge, group actions may be decided in a panel of three judges (Section 582 para 1)

In case of parallel group actions involving the same legal matter of factual question, neither group action can be stayed in respect of the other proceeding (Section 591 para 1). However, in case of parallel conduct of group actions with public interest actions, courts may stay the group action upon the request of the representative claimant until a judgment is rendered in a collective action (Section 591 para 2). Finally, the new CPA also provides that a judgments in group actions have no precedential value for any following group, individual or public interest actions related to the same subject matter (section 591 para 3).

These are single staged actions.

Summary proceedings are not available, and the general rules apply as to the collection of evidence and interim measures.

Court directed settlement is available based on Section 586 para 1 that should be read in connection with general rules in Sections 195 and 238.

### **3. Available Remedies**

The general rules on damages compensation and limitation periods apply.

As a matter of general rule, punitive damages are not available.

### **4. Costs**

The general rule, the loser pays principle applies. Courts will associate the costs to the representative claimant (Section 590 para 3)

### **5. Lawyers' Fees**

Legal representation is mandatory (Section 582 para 2); there are no special rules on lawyers' fees.

Contingency fees are possible but not common in practice.

## **6. Funding**

There are no special provisions on funding.

## **7. Enforcement of collective actions/settlements**

The general rules on enforcement of court judgments apply under Act LIII of 1994.

## **8. Number and types of cases brought/pending**

N/A

## **9. Impact of the Recommendation/Problems and Critiques, including**

### **a. Consequences where no collective redress mechanism is available**

N/A

### **b. Impact of the collective mechanism (or lack of) on behaviour/policy of stakeholders (direct/ indirect, economic/social impact)**

N/A

### **c. Incompatibilities with the Recommendation's principles**

Comments to points 14-17, 19, 20, 35-37, and 39 of the Recommendation made above under A equally apply here.

### **d. Problems relating to access of justice/fairness of proceedings including**

N/A

## **D. Collective Redress Mechanism under the Competition Act**

### **1. Scope/ Type**

Scope: matters within the competence of the Hungarian Competition Authority

Type: injunctive and compensatory

### **2. Procedural Framework**

Special procedural rules are set out in Act LVII of 1996 on Prohibition of Unfair Market Conduct and Restriction of Competition that should be read together with general procedural rules in the CPA.

**a. Competent Court**

The general rules of the CPA apply, as above under A.

**b. Standing**

Section 92 para 1 conferres standing on the Hungarian Competition Authority (Gazdasági Versenyhivatal).

**c. Availability of Cross Border collective redress**

There are no special provisions to this effect in the act; however, according to general rules, the cooperation with foreign competition authorities are governed by international agreements or special legal acts (Section 94).

**d. Opt In/ Opt Out**

This is the same type of action as under the Consumer Protection Act (public interest enforcement).

The existence of a collective action does not deprive consumers to commence individual actions in regard to the same subject matter (Section 92 para 8).

**e. Main procedural rules**

These actions are conditioned upon the prior administrative process commenced (note that the act says commenced not conducted) in front of the Hungarian Competition Authority in regard to the infringement, and a large number of consumers being affected by the infringement the circle of which can be determined at the time of submitting the claim (Section 92 para 1).

One option is to ask for a declaratory judgment that determines an infringement has occurred. The court will then identify the group of consumers affected by the judgment. Any injured consumer within the group may submit a separate claim for damages, only needing to prove the causal link between the infringement and damage and the amount of damages suffered. In addition to asking for an injunction, the Hungarian Competition Authority can also seek damages or specific performance of the outstanding contractual obligation, provided the amount of damages or the content of specific performance is determinable (Section 92 para 4-5).

The court may empower the Hungarian Competition Authority to publish the judgment in one newspaper with national significance at the expense of the business, or to publish the judgment in another appropriate form (Section 92 para 6)

Limitation period is 3 years that is counted from when the infringement has occurred (Section 92 para 1).

Regarding everything else the general rules in the CPA apply.

**3. Available Remedies**

Injunction and damages

**4. Costs**

As above under A.

## **5. Lawyers' Fees**

Contingency fees are possible but not common in practice.

## **6. Funding**

As above under A.

## **7. Enforcement of collective actions/settlements**

Businesses must voluntarily comply with the award of damages or specific performance; in the absence of voluntary compliance, this act specially empowers consumers to enforce the judgment rendered in the collective action individually (Section 92 para 7).

## **8. Number and types of cases brought/pending**

There has been only one case so far (see below).<sup>463</sup>

## **9. Impact of the Recommendation/Problems and Critiques, including**

### **a. Consequences where no collective redress mechanism is available**

N/A

### **b. Impact of the collective mechanism (or lack of) on behaviour/policy of stakeholders (direct/ indirect, economic/social impact)**

There is no evidence on the impact of these actions on the behaviour of businesses.

### **c. Incompatibilities with the Recommendation's principles**

These solutions may be incompatible with points 10-11, 19,20,21, 35-37 and 39 of the Recommendation as discussed above under A.

### **d. Problems relating to access of justice/fairness of proceedings including**

These collective actions are limited to the commencement for the protection of consumers, there are numerous procedural requirements for the commencement of the process and in the absence of voluntary compliance enforcement ultimately becomes individual (see above under B).

The position of consumers could be somewhat improved by the possibility of the business to promise a change in its behaviour in an exchange for escaping formal sanctions in the administrative process, to take 'undertakings' (kötelezettségvállalás) based on Section 75. This is usually followed by a

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<sup>463</sup> Metropolitan Regional Court [Fővárosi Törvényszék] decision no 32.G.45.056/2013/25  
Also available at [http://www.gvh.hu/dontesek/birosagi\\_dontesek\\_vj\\_szam\\_alapjan/birosagi\\_dontesek\\_2010/Vj\\_122\\_2010\\_292.html](http://www.gvh.hu/dontesek/birosagi_dontesek_vj_szam_alapjan/birosagi_dontesek_2010/Vj_122_2010_292.html)

'public contract' (hatósági szerződés). With this agreement, the business undertakes a commitment to change its practice, with the authority specifying the practices that need to be changed. Although this may be an effective way for improving business practices in long term that would inevitable help consumers, the aim of this rule was to give an opportunity for the business to stop the procedure.<sup>464</sup>

## **E. Collective Redress Mechanism under the Act on Hungarian National Bank**

### **1. Scope/ Type**

Sectoral (financial services)

Injunctive and compensatory

### **2. Procedural Framework**

Special procedural rules are laid down in Act CXXXIX of 2013 on Hungarian National Bank that should be read together with general procedural rules in the CPA.

#### **a. Competent Court**

As above under A

#### **b. Standing**

Standing is vested on Hungarian National Bank (Section 164 paragraph 1) and the consumer protection organizations (Section 164 paragraph 8).

#### **c. Availability of Cross Border collective redress**

Based on Section 164 paragraph 8 standing to sue is extended to entity established in the EEA registered with the EU Commission based on Section 4 paragraph 3 of Directive 2009/22/EC, provided that the infringement of EU law occurred in the area of unfair commercial practices or unfair terms in financial services contracts or in regard to the implementation of Directives 2014/17/EU, 2008/48/EC and 2002/65/EC.

#### **d. Opt In/ Opt Out**

This is the same type of action as under the Consumer Protection Act (public interest enforcement).

The existence of a collective action does not deprive consumers to commence individual actions in regard to the same subject matter (Section 164 para 7).

#### **e. Main procedural rules**

Section 164 provides for public interest enforcement actions.

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<sup>464</sup> Klaudia Bencsik 'A kollektív igényérvényesítés hazai lehetőségei' [Domestic possibilities for collective enforcement], Themis, 2015 at [http://epa.oszk.hu/02300/02363/00023/pdf/EPA02363\\_THEMIS\\_2015\\_jun\\_005-032.pdf](http://epa.oszk.hu/02300/02363/00023/pdf/EPA02363_THEMIS_2015_jun_005-032.pdf)

These actions are conditioned upon the prior administrative process conducted in front of the Hungarian National Bank that has established the infringement, and a large number of consumers being affected by the infringement the circle of which can be determined at the time of submitting the claim.

One option is to ask for a declaratory judgment that determines an infringement has occurred. The court will then identify the group of consumers affected by the judgment. Any injured consumer within the group may submit a separate claim for damages, only needing to prove the causal link between the infringement and damage and the amount of damages suffered. In addition to asking for an injunction, enforcement authorities can also seek damages or specific performance of the outstanding contractual obligation, provided the amount of damages or the content of specific performance is determinable (Section 164 paragraphs 3-4). Businesses must voluntarily comply with the award of damages or specific performance in the absence of which affected consumers may ask the court to enforce the judgment.

The limitation period is 3 years (Section 164 paragraph 2).

For everything else, the general rules of CPA apply as above under A.

### **3. Available Remedies**

Injunctions and damages

### **4. Costs**

As above under A.

### **5. Funding**

As above under A.

### **6. Enforcement of collective actions/settlements**

Businesses must voluntarily comply with the award of damages or specific performance; in the absence of voluntary compliance, this act specially empowers consumers to enforce the judgment rendered in the collective action individually (Section 164 para 6)

### **7. Number and types of cases brought/pending**

Not available.

### **8. Impact of the Recommendation/Problems and Critiques, including**

#### **a. Consequences where no collective redress mechanism is available**

N/A



**b. Impact of the collective mechanism (or lack of) on behaviour/ policy of stakeholders (direct/ indirect, economic/social impact)**

As above under A and B.

**c. Incompatibilities with the Recommendation's principles**

As above under A.

**d. Problems relating to access of justice/fairness of proceedings including**

As above under A and B.

**F. Collective redress mechanism based on Act XXXVIII of 2014**

**1. Scope/ Type**

Sectoral (financial services)

Injunctive

**2. Procedural Framework**

Procedural rules are set out in *Act XXXVIII of 2014 on settling certain matters in regard to the Supreme Court's (Kuria) decision on consumer credit contracts*.<sup>465</sup> This act has been adopted to mitigate the consequences of the Hungarian consumer credit crisis. It mandated banks to scrutinize the fairness of standard terms within the parameters given in Section 4 of this act (that set out the test of fairness and conditions under which contract terms may have been unilaterally modified) within a set timeframe. Following this this scrutiny they were supposed to express an opinion to the Hungarian national Bank whether they consider that the terms in question are fair or unfair (they must have at the same time submitted a list of contracts affected by the term and the amount of revenues generated by these contracts). Should the Hungarian National Bank disagree with the banks opinion on the fairness of their terms, it should have initiated a collective action and asked the court to rule on the fairness of a term (see Articles 5).

The above act is supplemented with procedural rules set out in *Act XL of 2014 accounting and other rules of Act XXXVIII of 2014 on settling certain matters in regard to the Supreme Court's (Kuria) decision on consumer credit contracts*.

These special rules are supplemented by the general rules of the CPA.

**a. Competent Court**

Exclusive competence of the Metropolitan Regional Court regional Section 9 para 1 of Act XXXVIII of 2014, and Section 33 para 1 of Act XL of 2014)

**b. Standing**

Standing is given to the Hungarian National Bank.

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<sup>465</sup> It refers to 2/2014 PJE Decision of the Supreme Court adopted earlier.

**c. Availability of Cross Border collective redress**

Not available.

**d. Opt In/ Opt Out**

There is no opting in or out, the National Banks acts in the general public interest.

**e. Main procedural rules**

Act XXXVIII of 2014 that created an obligation of the Hungarian National Bank to commence collective actions under the given circumstances, if they were unsatisfied with the firms' opinion as to the fairness of their standard terms. The special procedural rules provided numerous exception rules from the CPA (see Section 7). The most important are that court must have dealt with these claims as a matter of priority (Section 7 para 4) and judgments are rendered in a summary process, ending within 30 days (Section 9 para 3). Article 7 set out numerous rules on expediency of the process, setting short deadlines for procedural actions and for example banning the stay of the process.

**3. Available Remedies**

**Injunction:** This action may have ended with an injunction determining that the term in question is unfair and thus null and void (Section 36 para 1 of Act XL of 2014).

Although the action ended with an injunction, this has triggered the legal obligation of firms set out in Act XL of 2014 to compensate customers for the moneys they have charged based on the unfair term.

**4. Costs**

Court fees were unusually high for these actions. First instance fee was 1.5000.000 Hungarian Forints that is around 4900 EUR (Section 7 para 7), appeal 2.500.000 Hungarian Forints that is around 8000 EUR (Section 13 para 2), appeal to the Supreme Court 3.500.000 Hungarian Forints that is around 11000 EUR (Section 15 para 2).

Legal representation is mandatory (Section 7 para 3).

**5. Funding**

N/A

**6. Enforcement of collective actions/settlements**

As the other actions, this also assumes voluntary compliance by the business. However, compliance here is controlled by the Hungarian National Bank within its regular supervisory procedure (Section 32 para 1 of Act XL of 2014).

## **7. Number and types of cases brought/pending**

Following the specific time-frame foreseen by Section 6 para 2 of Act XXXVIII of 2014 within which these claims could have been initiated (14 February and April 30 2015) the Hungarian National Bank commenced 16 collective actions against banks<sup>466</sup>

## **8. Impact of the Recommendation/Problems and Critiques, including**

### **a. Consequences where no collective redress mechanism is available**

NA

### **b. Impact of the collective mechanism (or lack of) on behaviour/policy of stakeholders (direct/ indirect, economic/social impact)**

This question is difficult to answer as it raises the question of effectiveness of financial supervision in general. However, it could be noted that the Hungarian National Bank did not report any other noncompliance with these acts following its announcement of the results of the 16 collective actions.<sup>467</sup>

### **c. Incompatibilities with the Recommendation's principles**

There may be incompatibilities with points 21, 25-28 and 35-37 of the Recommendation.

### **d. Problems relating to access of justice/fairness of proceedings including**

NA

## **G. Collective Redress Mechanism under various acts on the protection of environment <sup>468</sup>**

### **1. Scope/ Type**

Scope: sectoral (environmental law)

Type: Injunctive

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<sup>466</sup> The Hungarian National Bank commenced 16 collective actions against financial firms [Tizenhat pénzügyi intézmény ellen indít az MNB közérdekű keresetet az elszámolás kapcsán] at <https://www.mnb.hu/sajtoszoba/sajtokozlomenyek/2015-evi-sajtokozlomenyek/tizenhat-penzugyi-intezmeny-ellen-indit-az-mnb-kozerdeku-keresetet-az-elszamolas-kapcsan>

<sup>467</sup> Ibid

<sup>468</sup> This is a 'non-standard' type of collective action; its aim is not collective redress and the protection of consumers as envisaged by the Recommendation. In Hungary however these are considered to be collective actions (see Gelencser, footnote 1) because they are conducted to protect the public interest, they are collective in a sense of aiming to protect a large group of subjects, they empower organizations representing the interests of these subjects or the public prosecutor to commence actions, and they are for the cessation of infringing behaviour.

## **2. Procedural Framework**

Special procedural rules are in Act LIII of 1995 on the general rules on the protection of environment; in Act LIII of 1996 on the protection of nature; and Act XXVIII of 1998 on the protection and preservation of animals. These are supplemented by general rules in the CPA.

### **a. Competent Court**

As above under A.

### **b. Standing**

Claims for the endangerment of environment, contamination of environment and damaging the environment may be submitted by organizations established for the protection of environment and by the public prosecutor (based on Act LIII of 1995, sections 99 and 109)

Claims for the engenderment or infringement of natural value, territory or protected nature standing is conferred on the public prosecutor (based on Section 60 para 2 Act LIII of 1996)

Claims for the unlawful infringement or endangerment of territories of nature (nature reserves) standing is conferred on organizations established for the protection of environment (based on Act LIII of 1996, Section 65)

Claims for the infringement of the rules on the protection of animals may be submitted by organizations established to protect the animals (based on XXVIII of 1998, 48 para 2)

### **c. Availability of Cross Border collective redress**

No.

### **d. Opt In/ Opt Out**

Not relevant given that the subject matter of these claims, there is no circle of protected subjects, everyone benefits from the rules on the protection of environment and animals (wildlife).

### **e. Main procedural rules**

There are no special procedural rules; the general rules in the CPA apply.

## **3. Available Remedies**

Based on Act LIII of 1995, organizations established to protect the environment may ask the competent public body to take the appropriate actions; or they may commence a court action against the infringer. The court may issue a restitution, a cease and desist order, or an order to prevent damage to the environment.

Based on Act LIII of 1995 the public prosecutor can commence a court action for damages compensation award or for a cease and desist order. Apart from a civil action, the public prosecutor can also commence a criminal action,

provided there has been a criminal offence based on Act C of 2012 on the Criminal Code.<sup>469</sup>

Based on Act LIII of 1996 the public prosecutor can commence an action for injunction (cease and desist order) or damages for the engenderment or infringement of natural value, territory or protected nature standing is conferred on the public prosecutor; in case of unlawful infringement or endangerment of territories of nature (nature reserves) organizations established for the protection of environment can ask the competent public body to take action, or can commence an court process against the infringer

Based on Act XXVIII of 1998 organizations established to protect the environment can seek the court to issue cease and desist orders.

#### **4. Costs**

As above under A.

#### **5. Lawyers' Fees**

Contingency fees are possible but not common in practice.

#### **6. Funding**

As above under A.

#### **7. Enforcement of collective actions/settlements**

As above under A.

#### **8. Number and types of cases brought/pending**

According to the above mentioned study 7 claims have been submitted.<sup>470</sup> These has been numerus cases involving various aspects of environmental law, for example actions for stopping air pollution,<sup>471</sup> actions to top the building of a motorway<sup>472</sup> etc, these were however all rejected for the lack of competence of the court, for various reasons that cannot be generalized.

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<sup>469</sup> Act C of 2012 contains a number of criminal offences connected to environment in Sections 241- 252. These can be grouped in general criminal offences against damaging the environment (for example, a criminal offence of damagining the environment in Section 241); criminal offences against the harm of animals (for example, a ciriminal offence of animal torture in Section 242); and criminal offences against abusing the use of dangerous materials (for example, a criminal offence of abusing the use of radioactive materials in Section 250).

<sup>470</sup> Gelencser, footnote 1

<sup>471</sup> Kuria, EBH decision no. 2010.2233.

<sup>472</sup> Metropolitan Court of Appeal, decision no FIT-H-PJ-2008-364

## **9. Impact of the Recommendation/Problems and Critiques, including**

### **a. Consequences where no collective redress mechanism is available**

N/A

### **b. Impact of the collective mechanism (or lack of) on behaviour/policy of stakeholders (direct/ indirect, economic/social impact)**

As above under A.

### **c. Incompatibilities with the Recommendation's principles**

All incompatibilities identified above apply here except point 7, and there is no evidence although it is likely that the comment to point 4 applies.

### **d. Problems relating to access of justice/fairness of proceedings**

No known problems.

## **H. Collective Redress based on Equal Opportunities Act<sup>473</sup>**

### **1. Scope/ Type**

Scope: sectoral (employment law)

Type: injunction

### **2. Procedural Framework**

Special rules are set out in Act CXXV of 2003 on equal treatment and on the furtherance of equal opportunities that are supplemented by general procedural rules in the CPA.

#### **a. Competent Court**

These cases are decided by Labour Courts which competence is determined based on the seat of the employer, that is determined based on the employee's place of work indicated in the contract of employment (Section 349/B para 2 of the CPA).

#### **b. Standing**

Based on section 20 para 1, standing is provided for the public prosecutor, the public authority, and relevant non-governmental civil societies.

#### **c. Availability of Cross Border collective redress**

NA

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<sup>473</sup> As above under footnote 32.

#### **d. Opt In/ Opt Out**

The claim does not have to specify individual consumers. Claims may be submitted if the act infringed a larger group of individuals that are not identified.

#### **e. Main procedural rules**

Infringement of equal treatment obligations may trigger a collective labour dispute or collective actions about rights relating to personality (Section 20 para 1).

Claims may be submitted for the protection of rights related to personality that are infringed or that are in danger of being infringed. These infringements are based characteristics that form an important feature of some peoples' personality and affect a larger group of unidentified people (Section 20 para 1). It is important to note that the group of people must be unidentified, a large group of people whose identity is known cannot give rise to this action.<sup>474</sup> The rights infringed must be those relating to the characteristics of a personality, belonging to the same interest group is not a personality characteristics.<sup>475</sup>

### **3. Available Remedies**

Injunction

#### **4. Costs**

As above under A.

#### **5. Lawyers' Fees**

Contingency fees are possible but not common in practice.

#### **6. Funding**

As above under A.

### **7. Enforcement of collective actions/settlements**

No mention of enforcement in the relevant laws, so the general rules in Act LVII of 1994 apply.

### **8. Number and types of cases brought/pending**

There has only been one case so far, that has ended with the dismissal of the claim.<sup>476</sup>

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<sup>474</sup> County Court of Bács-Kiskun, decision no. 3.Mf.21.085/2010/3.

<sup>475</sup> Ibid

<sup>476</sup> Labour Court of Kecskemét, decision no 2.M.722/2009/7. in addition to these, 17 other cases has been commenced (Gelencser, footnote 1).

## **9. Impact of the Recommendation/Problems and Critiques, including**

### **a. Consequences where no collective redress mechanism is available**

N/A

### **b. Impact of the collective mechanism (or lack of) on behaviour/policy of stakeholders (direct/ indirect, economic/social impact)**

N/A

### **c. Incompatibilities with the Recommendation's principles**

Comments attached to points 14-17, 19, 20, 21, 35-37, and 39 said above under A are valid here. There is no evidence, but possibly also comments attached to points 4, and 25-28.

### **d. Problems relating to access of justice/fairness of proceedings including**

These collective actions are condition upon the infringement affecting a larger group of people that are not identified. If the infringement affects a group of people that are identified, any claims for collective actions will be dismissed and people will be directed to realize their claims in individual actions (although it should also be noted that the problem will be solved by the new CPA based on which an identified group of people will be able to submit a group claim).

## **I. Collective ADR**

### **1. Scope/ Type**

Consumer

Injunctive and compensatory

### **2. Procedural Framework**

The procedural framework is set out in Act CLV of 1997 on Consumer Protection.

#### **a. Competent Court**

Hungary has two out-of-court ADR schemes specifically designed for the resolution of consumer to business disputes. Consumer Arbitration Boards (Békéltető Testület) are competent to hear disputes regarding the conclusion and performance of contracts for the sale of goods or services, or in the absence of a contract, disputes regarding the quality and safety of goods and services or the application of the rules on product liability (Section 18 paragraph 1 in connection with Section 2 subsection s)). The competence of these bodies is therefore very wide and includes a range of possible disputes, except for disputes arising in contracts for financial services that are under the competence of Financial Arbitration Board (Penzügyi Békéltető Testület). From the aspect of collective actions, Financial Arbitration Boards and



financial services disputes are not relevant given that Act CXXXIX of 2013 on the Hungarian National Bank regulating this body makes no mention of joint claims by multiple consumers.

Consumer Arbitration Boards are independent bodies that operate by chambers of commerce and industry, i.e. at the Budapest Chamber of Commerce and Industry and at the remaining 19 regional chambers of commerce and industry (Section 18 para 2).

**b. Standing**

Group of consumers that has suffered infringement (Section 20 paragraph 4)

**c. Availability of Cross Border collective redress**

Cross border redress is available.

For offline disputes, in the absence of Hungarian residence for claimants (in case of foreign claimants) the competence of the Consumer Arbitration Board is determined based on the seat of the business (Section 20 paragraph 2).

For online disputes, the competent ADR body is the Budapest Arbitration Board (Section 19).

**d. Opt In/ Opt Out**

Collective ADR processes are group actions given that the claim is submitted jointly by claimants that has suffered the same infringement, showing their express consent, these would then be opt-in actions.

**e. Main procedural rules**

No special rules for multi-party actions. The general procedural rules for processes in front of Consumer Arbitration Boards apply.

Two stage process: the commencement of ADR process is conditioned upon a previous attempt to settle the dispute amicably with the business (Section 27).

The process in front of Consumer Arbitration Boards may also have two stages. The panel with first try to settle the dispute between the parties, and only proceed to rendering a decision on the merits of the case if mediation is unsuccessful (Section 18 para 1).

The decision may be a non-binding recommendation or a binding decision for the business (Section 32). However, the binding decision must be accepted as binding by the business (with or before or after the decision has been made) (Section 36/C).

Binding decisions and recommendations can exceptionally be set aside by the competent regional court. Setting aside can be asked on limited procedural grounds: the composition of the deciding panel or the process has infringed the provision of Act CLV of 1997, absence of competence of the Consumer Arbitration Board, or the complaint was supposed to be rejected. Recommendations can also be set aside if their content did not comply with the relevant law (Section 34 paras 3 and 4).

From September 2015, the mediation phase of the process is mandatory for the business (Section 29 para 11 – the business has an obligation to cooperate with the consumer). This has been introduced because businesses frequently refused to take part in the process.

The process is normally conducted by a tripartite panel. Exceptionally simple cases may be conducted by a one-person panel (Section 25 para (1) and (4)). Members of the panel are nominated by the parties from the list maintained by the commercial chamber. Both consumers and business entities nominate one person from the list, and the third member is appointed by the president of the relevant Consumer Arbitration Board (Section 25 para 2).

As with other ADR processes the deadlines are short. After receiving the claim, the Consumer Arbitration Board will check its competence and the eligibility of claim, and will schedule a hearing within 60 days from finding a valid claim, with other short procedural deadlines during the process (See section 29). The process must end within 90 days that can exceptionally be extended with an additional 30 days period (section 31 paragraph 5)

### **3. Available Remedies**

As with ADR in general, the remedies are flexible, although they must comply with the law. The mediation agreement reached by the parties following the first stage of the process is endorsed by the panel. Given that endorsed agreements can be enforced by courts, endorsement is only possible under the condition that the agreement complies with relevant laws (Section 30 paragraph 1). Should the parties wish to deviate from the applicable rules, the Arbitration Board will end the process.<sup>477</sup> It seems that the panel is somewhat constrained by the boundaries of the law when it comes to adopting recommendations, given that under Section 34 paragraph 4 the competent court can set aside recommendations should it fail to comply with the relevant laws (jogszabályok)

### **4. Costs**

Submitting a claim is free of charge, however, the process itself may incur costs such as payment for expert opinion. These costs are borne by the losing party in the dispute (Section 33 para 3), and they may go well beyond the value of the claim (see below).

Parties may be represented by lawyers. Lawyers' fees are borne by each party and are not counted towards the cost of the process (Section 33 paragraph 2)

### **5. Lawyers' Fees**

Legal representation is possible; there are no special rules on lawyers' fees.

Contingency fees are possible but not common in practice.

### **6. Funding**

Funding is not available.

### **7. Enforcement of collective actions/settlements**

Unless the business accepts the decision as binding, compliance remains voluntary (as explained above.)

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<sup>477</sup> Commentary on Section 30 paragraph 1 in Új Jogtár.

## **8. Number and types of cases brought/pending**

There are no known cases so far.<sup>478</sup>

## **9. Impact of the Recommendation/Problems and Critiques, including**

### **a. Consequences where no collective redress mechanism is available**

N/A

### **b. Impact of the collective mechanism (or lack of) on behaviour/policy of stakeholders (direct/ indirect, economic/social impact)**

N/A

### **c. Incompatibilities with the Recommendation's principles**

The comments above for pints no14-17, 20, 35-37 and 39 are relevant here.

### **d. Problems relating to access of justice/fairness of proceedings including**

The greatest problems were in the process not being mandatory for the business (hence businesses frequently refused to participate in the process) and for the decision of the panel not being binding on the business. From 2015 the first obstacle for access to justice has been eliminated, and now only the second, the decision not being binding on the business remains. Currently, unless businesses accept the decision as binding, consumers have no recourse to court enforcement proceedings and compliance remains voluntary. Consumers find difficulties in enforcing the non-binding recommendations as the greatest disadvantage of the ADR process (46.21%)<sup>479</sup>

Another issue may be costs. Although the process is free of charge, the panel may direct parties to obtain expert evidence. This is payable by the parties (each party may have their own experts) and the costs are born by the losing party at the ends of the process. In small value disputes for example shoes worth below 100 EUR costs could go well beyond the value of dispute, for example, a 100 EUR for each expert that is 200 EUR for two experts.<sup>480</sup>

This problem applies to ADR in general and is not specific to collective ADR.

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<sup>478</sup> The conclusion has been arrived at looking at aggregate annual reports of all Consumer Arbitration Boards available on the Hungarian Chamber and Industry (Magyar Kereskedelmi és Iparkamara) web-site (period between 2012 and 2004) at <http://www.mkik.hu/hu/>

<sup>479</sup> Arbitration Board of Budapest, Annual Report for 2013 [A Budapesti Békéltető Testület 2013. évi beszámolója], p 26 at [www.bekeltet.bkik.hu/5-Kozlemenyek](http://www.bekeltet.bkik.hu/5-Kozlemenyek), see also Andrea Fejős, Chris Willett, 'Consumer Access to Justice; The Role of the ADR Directive and the Member States' Vol 24 no 1 European Review of Private Law 2016

<sup>480</sup> Andrea Fejős, Consumer Protection in Sales Transactions in Hungary Vol. 49 Issue 4 Acta Juridica Hungarica 2008, p. 463

### III. Information on Collective Redress

There is no national registry of collective claims; just general statistics on the number of disputes pending and completed without separating out and collecting collective actions.

Information on collective redress may also be obtained by the publication of the judgment. Most of the above statutes provide that the court will decide on the manner of the publication, and this will be set out in the judgment. Usually this is done in a newspaper of national significance and the decision may be published online. However, as mentioned above there are no targeted campaigns that would popularize individual decisions, and there is no place where these decisions would be available collectively.

We can therefore conclude that the channels for dissemination of information on collective claims are not effective

### IV. Case summaries

<p><b>Case name</b> Yellow cheque</p> <p><b>Reference</b> 14.Gf.40.605/2013/7.</p> <p><b>Subject area</b> Consumer protection</p>	<p><b>Keywords</b> Unfair contract terms</p> <p><b>Summary of claims</b></p> <ul style="list-style-type: none"> <li>• Claimant asked for injunction and damages in the amount of the price paid for cheques used to pay bills (142,24 Hungarian Forints, approximately 50 PENCE) based on Section 38 para 3 Act CLV of 1997.</li> <li>• Claimant also asked the court to determine the circle of consumers that are entitled to claim compensation (based on the above section).</li> <li>• Finally, it asked the court to rule on the publication of the judgment (based on Section 38 para 6)</li> </ul> <p><b>Findings</b></p> <ul style="list-style-type: none"> <li>• In this case a mobile phone company unfairly charged consumers in various ways including by imposing a special charge on payments done in post offices by yellow cheques – the so called yellow cheque case.</li> <li>• The court ruled that the imposition of the charge was unfair and thus null and void</li> </ul>
<p><b>Dispute resolution method</b> Collective action</p> <p><b>Court or tribunal</b> Metropolitan Court of Appeal (Fővárosi Ítéltábla)</p>	
<p><b>Cross-border character/ implications, if any</b> NA</p>	

<b>Opt-in/out</b> opt-out	<p>under Act C of 2003 on electronic communications that specially forbid in Section 128 para 4 the charging of customers for issuing an invoice independent from the way of paying the invoice. In this case the company imposed a charge although the method of payment in question did not actually cost anything for the company neither did it provide a separate service for the charge.</p> <p><b>Outcomes</b></p> <p>Settlement: NA</p> <p>Remedy: injunction</p> <p>Amount of damages awarded: No</p> <p>Distribution of damages: NA</p>
<b>Type of funding</b> None	
<b>Costs</b> loser pays	
<b>Abusive litigation</b> No	

<b>Case name</b> Real estate websites	<b>Keywords</b> <b>Unfair contract terms</b>
<b>Reference</b> 32.G.45.056/2013/25.	<b>Summary of claims</b> The Hungarian competition Authority commenced a collective action against a company (Weltimmo S.r.o, registered in Slovakia) that operated <a href="http://www.ingatlandepo.com">www.ingatlandepo.com</a> , <a href="http://www.ingatlanbazar.com">www.ingatlanbazar.com</a> real estate websites, on which it published standard terms and conditions.
<b>Subject area</b> Unfair competition	
<b>Dispute resolution method</b> Collective action	The Hungarian Competition Authority asked the court to determine the unfairness of some of the terms therein, based on now section 6:105 of the Civil Code (former Section 209 of the old Civil Code).
<b>Court or tribunal</b> Metropolitan Court Törvényszék)      Regional (Fővárosi	The Competition authority also asked the court to order the defendant to publish the judgment. The Hungarian Consumer Protection Authority interfered in support of the claim.
<b>Cross-border character/ implications, if any</b> Yes, one defendant (Weltimmo S.r.o) was a company registered in	<b>Findings</b> The court found jurisdiction based on Act XIII of

Slovakia	<p>1979 on international private law given that the affected consumers had their permanent or temporary residence in Hungary.</p> <p>The court also found the unfairness of the terms and conditions under scrutiny.</p> <p>It ordered the defendant to publish a notification of the judgment for the duration of 1 year on the websites in question, at its own expense within 15 days following the judgment. The court formulated the text of the notification that contained the name of the court, the date of the judgment, the ruling of the court, the period in which the terms have been used and the text of the unfair contract terms.</p> <p><b>Outcomes</b></p> <p>Settlement: no</p> <p>Remedy: injunction</p> <p>Amount of damages awarded: NA</p> <p>Distribution of damages: NA</p>
<b>Opt-in/out</b> opt-out	
<b>Type of funding</b> None	
<b>Costs</b> loser pays	
<b>Abusive litigation</b> No	

<b>Case name</b> Lombard case	<b>Keywords</b> Unfair contract terms
<b>Reference</b> Pf.I.20.452/2007/3.	<b>Summary of claims</b> The public prosecutor of Csongrad County (claimant) asked the court to determine the fairness of several terms and conditions in the defendant's Lombard Finaszírozási Zrt. (firm providing consumer credit) standard terms and conditions, and to rule on their nullity.
<b>Subject area</b> Consumer protection	Claimant also asked the court to order the publication of the judgment in several national and regional newspapers (Magyar Nemzet, Népszabadság, Világgazdaság, Délmagyarország) and on defendant's own website.
<b>Dispute resolution method</b> Collective action	Claimant based its claim on provisions of several acts, including the now section 6:105 of the Civil Code (former Section 209 of the old Civil Code)
<b>Court or tribunal</b> Szeged Court of Appeal (Szegedi Ítéltábla)	
<b>Cross-border character/</b>	

<b>implications, if any</b> Not known	<b>Findings</b>  The court found the unfairness of the terms and conditions under scrutiny, and ordered the publication of the judgment in one newspaper that is distributed at the seat of the defendant.  <b>Outcomes</b> Settlement: no Remedy: injunction Amount of damages awarded: NA Distribution of damages: NA
<b>Opt-in/out</b> opt-out	
<b>Type of funding</b> None	
<b>Costs</b> loser pays	
<b>Abusive litigation</b> no	

# IRELAND – FACTSHEET

## **Scope**

There is no horizontal or sectoral collective redress mechanisms in Ireland.

A mechanism called Representative Action exists but is very limited in practice, and solely injunctive.

## **Problems/Incompatibilities with Recommendation principles**

No legal framework which establishes and regulates the use of class-actions or other similar collective redress mechanisms in Ireland, despite the recommendations.

## **Standing** (Para. 4-7)

For representative actions, the representative must be authorized by the members of the class.

## **Admissibility** (Para. 8-9)

No specific rules in the absence of a collective redress mechanism.

## **Information on Collective Redress** (Para. 10-12, 35-37)

No specific rules in the absence of a collective redress mechanism.

## **Funding** (Para. 14-16)

The general applicable rules provide that third party funding of litigation is prohibited in Ireland.

Public funding is not allowed for representative actions.

## **Problems/Incompatibilities with Recommendation principles**

Because multi-party litigations usually entail heavy financial burden, the lack of possibility to fund it would usually prevent initiation of a representative action.

## **Cross Border Cases** (Para. 17-18)

No specific rules in the absence of a collective redress mechanism.

## **Expedient procedures for injunctive orders** (Para. 19)

No specific rules in the absence of a collective redress mechanism.

## **Efficient enforcement of injunctive orders** (Para. 20)

No specific rules in the absence of a collective redress mechanism.

## **Opt In/Opt Out** (Para. 21-24)

The representative action follows an opt-in system.

## **Collective ADR and Settlements** (Para. 25-28)

No specific rules in the absence of a collective redress mechanism.

## **Costs** (Para. 13)

The 'loser pays' principle applies.

## **Lawyers' Fees** (Para. 29-30)

Contingency fees agreements are permitted.



**Prohibition of punitive damages** (Para. 31)

Recovery of punitive damages is rare and limited (usually on public policy grounds).

**Collective Follow- on actions** (Para 33-34)

No specific rules in the absence of a collective redress mechanism.

**Interplay between injunctions and compensation across all sectors**

No specific rules in the absence of a collective redress mechanism.

# IRELAND – REPORT

## I. General Collective Redress Mechanism

### 1. Scope

Ireland does not currently have a structured collective redress mechanism in force. It follows that no framework exists which currently provides or regulates the use of a general collective redress mechanism in Ireland. The following sub-chapters will, therefore, describe those mechanisms which are used as a replacement to deal with multi-party litigations.

#### a. The Representative Action

Rule 9 of the Rules of the Superior Courts 1986 states:

“Where there are numerous persons having the same interest or matter, one or more such persons may sue or be sued, or may be authorized by the court to defend, in such cause or matter, on behalf, or for the benefit, of all persons so interested.”

Although this Rule provides that a person can initiate proceedings on behalf of a big number of people, it should be noted at the outset, that the application of this Rule is, in practice, very limited. The reason for this is the limitations associated with its application.

First, the representative must show that he or she is authorized by the member of the class to act on their behalf. This is however, not a rigid requirement because the authorization does not have to be in writing, and so an implied authorization could also suffice under certain circumstances. Nevertheless, the application of this limitation by the courts impacts the number and the type of the group members.

Secondly, Rule 9 provides that the members of the group on which behalf the representative action is conducted must have "same interest". This requirement was applied by the courts in a restrictive way, namely the interest of the different members must be identical, as opposed to other class action mechanism (and as opposed to the recommendation of the Law Reform) where it is suffice to show that the members of the class share a common legal or factual question. Again, this requirement means that the representative action can only be invoked in limited scenarios.

Thirdly, a representative action also has limited scope of remedies which the representative can seek on behalf of those he or she represent. Only an injunction or a declaratory remedy are available. No damages are allowed. This is, of course, a major restriction on the ability to use this mechanism to conduct multi-party litigations.

Fourthly, a judgment (or a settlement agreement approved by the court) in the commonly known class action binds all the member of the class as defined by the court. Although the members are sometimes allowed to ask to be excluded from the judgment (or the settlement agreement) the default is that they are bound by it, and so an appeal to the court is required if they indeed wish to be excluded. This is an advantage from the defendant`s point of view, given that the defendant knows that anyone falling within the

definition of the group is bound by the judgment, even absent of an active consent to be part of the group. A representative action is different. Here the judgment would bind only those represented by the representative, namely only those who authorized the representative to conduct the litigation on their behalf. Anyone else is not part of the litigation and hence not bound by its outcome. The result is that future litigations may be initiated against the defendant by litigants who has similar claims to those which were already litigated. Therefore, a judgment (or a settlement agreement) does not "immune" the defendant from the cost involved in similar proceedings if those are brought by litigants who were not represented in the representative action.

Lastly, it should also be noted that Rule 9 does not provide detailed procedural rules, which are usually required in order to be able to manage complex proceedings such as a multi-party action.

## **b. Test Cases**

The test case is mentioned in this report as means to conduct multi-party litigations although in fact it is not quite so given that it is not a structured tool for multi-party cases. Nevertheless, in the absence of a structured legal class action mechanism this tool is used in some instances to solve multi-party disputes and is, in practice, even more favorable and more commonly used than the above-mentioned Representative Action.

The test case is used when numerous proceedings are initiated by different individuals and those proceedings share common (or they arise out of the same) circumstances. If such is the case then one or few cases can be tried while the others remain pending. The outcome of the leading case would then serve as a benchmark for the other pending cases. In other words, the court's finding in the test case can use as an indication by other litigants who can learn from the judgment what the court's view is in the points they share with the test case.

Several points should be emphasized. Firstly, it is important to note that each one of the proceedings -both the test case and those which were stayed in anticipation of the judgment in the said test case - are separate and independent. That means that the judgment in the test case does not bind the others. It is true that, as mentioned above, in light of the common issue/s they share with the test case, the pending proceedings can get a clue on how the court is likely to role in their own case. This is particularly true in light of the common-law doctrine of precedents, according to which courts usually follow previous rulings with the same circumstances.

It is also important to note, that the ability of the test case to influence subsequent proceedings also depends on the issue of the case. If the case results in a legislation or administrative act being declared unconstitutional, then any subsequent litigant whose case is grounded on a similar argument is likely to easily be able to rely on the judgment in the test case. Things are, however, a bit more complicated when the case involves damages, given that there is a need to assess those damages individually per case.

Despite those two reservations the general rule is that the test case and the pending cases are separate and the said separation means that the judgment in the test case (or in any other similar case) does not bind the rest<sup>481</sup>. That

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<sup>481</sup> In practice the test case will usually serve as a benchmark which will help the rest of the cases to be settled out of court.

is, of course not the case in the "traditional" class-action, where the entire group members are usually bound by the judgment in the case of the representing claimant.

Secondly, usually in class actions the main plaintiff has the duty to conduct the proceedings in a way which is to the best interests of the group members. Here, the plaintiff has no such obligation. The cases are separate and so the plaintiff in the test case bear no obligations towards the pending cases or other potential cases which share the same circumstances.

Thirdly, the fact that the cases are separated also means that a potential plaintiff eligibility (whether his or her action was filed or yet to be so) for relief cannot be automatically derived from the judgment in the test case. Such potential claimant would usually need to initiate separate proceedings in order to get relief. When the defendant is the state, then the state might take a voluntary approach according to which those who can show that they have a similar case to the test case (and hence entitled to the same remedy) could claim it without the need to initiate legal action<sup>482</sup>. However, when the defendant is a private party, then that is not likely (or at least that is less likely) to happen.

Lastly, although the test case and the pending/future cases are separate, the court may be aware that its ruling in the test case has an effect on, potentially, many other cases. Because the test case is separate the judgment might not address those considerations although they were part of the decision making process albeit only in the back of the judge's mind. That is of course an unwanted situation.

## **2. Available Remedies**

Ireland does not currently have a structured collective redress mechanism, and so it follows that there are no provisions discussing the potential remedies available to the group in such proceedings. However, the remedies available in a Representative Action, discussed above, are restricted to injunctions and declaratory relief only. No damages can be awarded. It follows that a representative Action is not an appropriate mechanism to conduct cases when the cause of action on which it relies is tortious.

## **3. Costs**

Ireland does not currently have a structured collective redress mechanism, and so it follows that there are no provisions discussing the allocation of costs in such scenario. The general rules applicable to allocation of costs are set out in Court Order 99 of the Rules of the Superior Courts 1986. According to those rules, and similarly to other common law jurisdictions, the unsuccessful party usually bears the costs of the successful party.

## **4. Funding**

Third party funding of litigation is prohibited in Ireland. This view was reaffirmed recently by the Irish Supreme Court, in a judgment rendered in

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<sup>482</sup> For example, if the court rules that a certain tax collection was illegal, then the state can (and maybe even likely) to declare that any individual from which the said tax was collected is entitled to restitution without the need to take legal action.

May 2017 it held that "third party funding to support a plaintiff (where none of the exceptions apply) is unlawful by reason of the rules on champerty"<sup>483</sup>.

Further, with regard to the Representative Action the relevant legal source is the Civil Legal Aid Act 1995. S9(a) provides that:

Subject to any order made under subsection (10) and to the other provisions of this subsection, legal aid shall not be granted by the Board in respect of any of the following matters:

...

(ix) any other matter as respects which the application for legal aid is made by or on behalf of a person who is a member, and acting on behalf, of a group of persons having the same interest in the proceedings concerned.

It follows that in Representatives Actions no legal funding is available. To conclude, the Irish system is not very favorable in terms of third party funding in general and public funding of Representative Actions in particular. Because multi-party litigations usually entail heavy financial burden the lack of possibility to fund it would usually prevent initiation of such proceedings.

## II. Sectoral Collective Redress Mechanism

Ireland does not currently have a structured collective redress mechanism, and so it follows that there are no provisions specifically intended to regulate sectoral collective redress actions.

Certain EU initiatives allow defined statutory bodies and Consumer Organizations to initiate proceedings the aim of which is to protect consumer rights. However, those proceedings are not to be considered as the "classic" class action because they cannot be initiated by private individuals.

Test cases, which we discussed above can be initiated by private individuals, but this mechanism entails other problems which differ it from the "classic" class-action. Nevertheless, in some sectoral area this tool was proved to be successful.

For example, when Ireland failed to implement the 1978 Directive on Equal Treatment in Social Welfare, legal proceedings were brought against the State arguing breach of social welfare rights, and illegal discrimination. Several test cases were tried before the Irish courts. Eventually, and after the court had ruled in favor of the claimants, the State was willing to pay to 69,000 women who were subject to the same discrimination. In this case the test case tool was successfully used to protect social welfare rights.

A further example are proceedings brought against the State arguing negligence and liability on the part of the State for hearing loss suffered by members of the defense forces during military service. As a result of those proceeding it was found that the State was indeed negligent, and that it did not take measures to protect the hearing of members of the Defense Forces. Consequently this helped establish the liability of the State for other similar cases.

Another example of what can be seen is as a use of the test case mechanism in a niche area of the law is a test case brought against an obstetrician for an

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<sup>483</sup> Persona Digital Telephony v Minister for Public Enterprise [2015] IEHC 457.

unnecessary hysterectomy during childbirth. This is an example to a test case which was brought in the private sphere (as opposed to the cases discussed above which were against the State) and which when was upheld was relied upon by more than 60 other similar pending cases.

### **III. Impact of the EU Recommendation**

The Law Commission Consultation Paper was published back in 2013 and the Report was published two years later in 2005 – long time before the Recommendations of the EU commission. Although both Reports recommended that Ireland make changes to allow multi-party litigations no changes were made.

# ITALY – FACTSHEET

## Scope

There is no general collective redress mechanism

Multiple claims may be joined together under the regular rules of civil procedure.

Sectoral: Consumer, Competition, Financial Market, Product Liability and Administrative (Actions against public authorities.)

## **Problems/Incompatibilities with Recommendation principles**

Cultural resistance of Italian lawyers and judges to promote the *azione di classe*.

## Standing (Para. 4-7)

### Consumer

Consumers have standing to file a suit individually or through associations which they provide with a mandate.

For a consumer organisation to have standing it must fulfil a set of stringent criteria. Including that it must have been active for at least 3 years and have a specified level of membership. Additionally, it must be able to show that it has the financial resources to pursue the given class action.

### Administrative

Individuals with a direct interest corresponding to a situation legally protected and associations protecting the interests of its members

## **Problems/Incompatibilities with Recommendation principles**

Strict standing rules for organisations means there are few who are actually authorised to bring collective actions.

## Admissibility (Para. 8-9)

Admissibility is decided upon at the first hearing of the claim.

Admissibility criteria: Art. 140-*bis* Consumer Code states: 'the court establishes if there is a conflict of interest, if the main claimant can adequately represent the interests of the class, and if the rights of the proposed class members are homogenous'.

### Administrative

The claimant is obliged to send the public body a written warning prior to the commencement of the claim. This must be filed at court.

## Information on Collective Redress (Para. 10-12, 35-37)

Dissemination of information about claims is carried out via consumer organisations.

## **Problems/Incompatibilities with Recommendation principles**

There is no national registry and very limited information is available on collective redress issues.

## Funding (Para. 14-16)

Third party funding not used in Italy.

Public funding is available to any person whose income falls below the set financial threshold of EUR 10,766.33 per annum.

### **Problems/Incompatibilities with Recommendation principles**

In general, there are few sources of private funding and consumer organisations lack sufficient resources. Funding is one of the biggest obstacles for bringing collective proceedings in Italy.

There is no obligation on the parties to disclose their source of funding.

### **Cross Border Cases (Para. 17-18)**

Italian Law permits the participation of foreign claimants.

In order to initiate an action, a claimant must first file a complaint with the civil trial court in the capital of the respective region where the corporation's headquarters is based.

### **Expedient procedures for injunctive orders (Para. 19)**

There is no specific regime for obtaining interim orders. This is governed by the ordinary laws of civil procedure. Where there are justified grounds of urgency, the action for an injunction shall be conducted pursuant to Articles 669-bis to 669-quaterdecies of the Civil Procedure Code.

### **Efficient enforcement of injunctive orders (Para. 20)**

There is no regime specific to the enforcement of collective procedures and this is governed by the ordinary laws of civil procedure.

The deadline for compliance is set out in the order and a fine of between €516 and €1,032 may be imposed for each day of delay in complying.

### **Opt In/Opt Out (Para. 21-24)**

Opt-In only. This is seen as being in line with Italian constitutional principles and rules of civil procedure.

### **Collective ADR and Settlements (Para. 25-28)**

There is no court mandated settlement procedure.

There is no judicial supervision of the settlement procedure.

A settlement is not binding on the non-consenting class action participants and there is no requirement that a settlement must be made available to or cover all the participants in the class action other than the parties to the settlement themselves.

### **Costs (Para. 13)**

The loser pays principle applies, although, the final allocation of costs is determined by the court.

### **Problems/Incompatibilities with Recommendation principles**

The costs of collective actions as compared to individual actions is one of the main barriers to claimants commencing actions.

### **Lawyers' Fees (Para. 29-30)**

Lawyers and clients are free to enter into fee agreements, under which, fees can be based on a percentage of the amount of compensation awarded in a case.



The law prohibits arrangements where the lawyer's fees comprise a share of damages awarded to the successful claimant.

**Problems/Incompatibilities with Recommendation principles**

Courts do not have any power to review fee agreements.

**Prohibition of punitive damages** (Para. 31)

Extra-compensatory damages are not available.

**Skimming off/restitution of profits**

Consumers may obtain restitutionary damages/account of profits.

**Collective Follow- on actions** (Para 33-34)

It is possible to rely on an administrative decision in a subsequent collective action under Art 140*bis*

**Interplay between injunctions and compensation across all sectors**

Not possible to seek an injunction and compensation in single action

It is possible to rely on an injunction in separate follow on proceedings under Article 139/140.

# ITALY – REPORT

## **I. Sectoral Collective Redress Mechanism: Consumer Law**

### **1. Scope/ Type**

Art. 140-bis ICC (azione di classe) establishes that consumers with homogenous interests have a right to file the azione di classe against a private corporation in three different cases:

- a) breach of contract;
- b) unfair or anticompetitive commercial practice; and
- c) product or service liability.

Paragraph 1 of the article 140-bis ICC provides that: 'The homogeneous, individual rights of consumers and users (...) can also be enforced through the azione di classe as provided for by this article. To this end, each class member can individually, or through associations to which they grant power or committees in which they participate, take action to assess liability and claim an order to pay damages and repayments'.

Thus, the paragraph 1 grants standing to:

- each member of the class
- associations and committees to which the class granted the power to act.

It is important to note that before Law 27/2012 came into force, Art.140-bis was only applicable to 'product liability'. In 2012, the law widened the scope of potential causes of action and indicated that even a company providing services, which does not meet the proper qualities, can be sued.

Consumers may obtain both compensation for damages and injunctive relief. In particular, consumer associations may act to protect the collective interests of consumers and users by applying to a Court for:

- a) a prohibition order against actions damaging to the interests of consumers and users;
- b) suitable measures to remedy or eliminate the damaging effects of any breaches;
- c) orders to publish measures in one or more national or local daily newspapers where publicising measures may help to correct or eliminate the effects of any breaches.

### **2. Procedural Framework**

#### **a. Competent Court**

The plaintiff must file a complaint with the civil trial court in the capital of the respective Region, where the corporation's headquarter resides. The Trial Civil Court will sit in chambers.

The decree-law also introduced the Companies Court. This is not a special court but an expansion of the existing specialised sections of courts (which have jurisdiction over intellectual property matters). They will be referred to as sections 'specialised in company matters' and will have jurisdiction over copyright matters, cases concerning the *azione di classe*, and company matters (i.e. actions between shareholders, actions regarding the transfer of holdings, shareholders' agreements, challenges to shareholders' meeting resolutions, liability actions, etc.). Also relevant are; public works, services, and supply contracts with European relevance involving an undertaking as a party.

## **b. Standing**

### ***Compensatory Redress (Art 140bis ICC)***

Consumers may act individually or through associations which they provide with a mandate or in which they participate.

### ***Injunctive Redress (Art 139-140 ICC)***

The associations of consumers and "users" (in the wording of the Italian Law) registered in the list before the Ministry of Economic Development under Art. 137 ICC have the right to act to protect the collective interest of the consumers and users according to the Article 139-140 ICC. Eighteen associations are registered in the said list, which is updated annually, adding new associations.

Please note that only the associations listed in the registry may bring an action according to the Art. 137 ICC.

Inclusion in the list is subject to the following requirements, which are confirmed by presenting documentation conforming to the directions and procedures established by an order from the Ministry of Economic Development:

- a) The association must have been in existence for at least three years, via a public or private certified deed, and shall possess sections regulating a democratic system with the sole aim of protecting consumers and users, and shall not be profit-making;
- b) A list of members must be kept and updated annually, with an indication of the fees paid directly to the association for statutory purposes;
- c) The number of members shall not be less than 0.5 per thousand of the population of Italy, and the association shall be present in at least five regions or autonomous provinces, with a number of members no lower than 0.2 per million inhabitants in each region.
- d) A statement of the income and expenditure shall be produced each year, indicating the fees paid by the members, and the keeping of accounts conforming with the legislation in force concerning accounting for non-registered associations;
- e) Continuous activities must have been carried out during the three previous years;
- f) Its legal representatives shall not have been convicted of any offences in relation to the association's activities, and the said representatives shall not be businessmen or directors of manufacturing or service companies, in

whatever form they are established, for the sectors in which the association operates.

These requirements are considered sufficiently strict to exclude inadequate representatives, but stricter certification requirements may reduce the number of authorised associations, strengthen the power of the few accredited ones, and ultimately make them detached from individual members of the community.

### **c. Availability of Cross Border collective redress**

Article 140-bis does not expressly exclude the participation of foreign consumers to the action.

Organisations recognised in another Member State of the European Union, registered on the list of entities entitled to take action for an injunction to protect the collective interests of consumers, published in the EU Official Journal, may act, pursuant to Article 139 ICC. They are also entitled to act, in accordance with the procedures pursuant to Article 140, against actions or behaviour, which is damaging to consumers in that country, affecting all or part of a Member State.

There are no reported cross-border cases to date.

### **d. Opt In/ Opt Out**

The participation mechanism is opt-in. Legal scholars consider this option more closely aligned with the traditional principles of fairness and due process.

## **3. Main procedural rules**

### **a. Admissibility and certification criteria**

After verifying the plaintiff's right of standing, the judge subsequently focuses on the admissibility of the action. Art. 140-bis Consumer Code states: "the court establishes if there is a conflict of interest, if the main plaintiff can adequately represent the interests of the class, and if the rights of the proposed class members are homogenous".

### **b. Single or Multi-stage process**

Single-stage process.

The Court issues a judgment by which – according to Article 1226 of the Civil Code - the final amounts due to those who have joined the act shall be paid, or shall establish the homogeneous *calculation criterion* to pay these sums. In the latter case, the Court assigns to the parties a period of not more than 90 days to agree on the liquidation of the damages. The minutes of the agreement, undersigned by the parties and the judge, is immediately enforceable. If the parties have not reached such agreement within 90 days, the judge, upon the request of at least one of the parties, liquidates the damages due to each member of the class.

### **c. Case-management and deadlines**

At the first hearing the Court shall decide by order on the admissibility of the claim; however, it may suspend the judgment when there is an on-going

investigation before an independent authority on the facts, which are relevant to the decision, or a trial before the administrative judge.

By the same order the Tribunal also determines the course of the procedure and, in particular:

- Settles the expenses;
- Determines the characteristics of the individual rights involved in the action, specifying the criteria according to which the individuals seeking to join are included in the class or must be regarded as excluded from the azione di classe;
- Establishes a peremptory time limit. Such a time limit shall not exceed one hundred and twenty days from the deadline for the public notification;
- Sets the terms and the most appropriate forms of notices to the public, so that those belonging to the class can join promptly. Public notification is a condition for the prosecution of the claim;
- Prescribes measures aimed at preventing undue repetitions or complications in the presentation of evidence or arguments.
- Regulates the preliminary investigation in the manner that it deems most appropriate and disciplines any other procedural matter, except for any formality, which is not essential to the debate.

By the peremptory time limit the plaintiff shall lodge the adhesion contracts at the registry. A copy of the order is sent by the registry to the Ministry of Economic Development, which is in charge of further publication, including on its website.

The order that determines the admissibility of the action can be appealed before the Court of Appeal in the peremptory time limit of thirty days from either its disclosure or notification, whichever occurs first. The Court of Appeal decides on the claim by an order and in closed session no later than forty days from the lodgement of the appeal. An appeal of the admissibility order does not suspend the proceeding before the Tribunal.

The intervention of a third party under Article 105 of the Code of Civil Procedure is prohibited.

#### **d. Expediency (particularly in injunctive cases)**

Where there are justified grounds of urgency, the action for an injunction shall be conducted pursuant to Articles 669-bis to 669-quaterdecies of the Civil Procedure Code. The length of the procedure is the same as for ordinary procedures. This means a period of two (2) years to obtain a judgment before the Tribunal.

#### **e. Evidence/discovery rules**

There are no rules of evidence particular to collective proceedings and the ordinary rules of civil procedure apply. As regards documentary evidence, there is no general duty to disclose documents to the adverse party. A party can apply for a specific document to be disclosed by the adverse party, provided it is established that:

- Such a document exists.
- It is in the possession of the other party.
- It is relevant to the matter at issue.

Attorney-client privilege applies in civil and criminal proceedings to cover any piece of information and/or documents made available by clients to lawyers (and the other way around).

Witnesses are heard only with the permission of the court and are requested to confirm or deny matters that are submitted to them through detailed questions. Only the judge can submit questions to witnesses. Questions are presented to the judge, in advance, and must be written exactly as they are to be put to the witnesses. The judge must assess the relevance and admissibility of the questions that the parties wish to submit but has no right to amend or supplement the questions and must either reject them or ask them as drafted by counsel.

Experts are not considered witnesses but rather professionals that advise the judge on specific technical issues. The judge can appoint an expert at any time (and irrespective of any application by the parties) for guidance on technical issues. Each party can appoint its own expert (and cover the fees).

#### **f. Interim measures**

There are no specific provisions for interim measures in collective proceedings although they are available according to the ordinary rules of civil procedure. Issue of an interim measure is subject to two requirements:

- a) the *periculum in mora*, i.e. the well-founded fear that, pending issue of a ruling on the merits, the right which the interim measure seeks to safeguard may be irreparably harmed;
- b) *b fumus boni juris*, i.e. a *prima facie* case for the claim.

The application for an interim measure is lodged with the competent court, which as a rule is the same as that handling the main case. The court examines the case briefly, hearing both parties, and then issues the interim measure. The interim measure may also be issued without hearing the other party, if summoning the other party might prevent application of the measure. The content of the interim measures varies according to the type of danger they are designed to avert. In these cases, they mainly consist of an order issued by the Court while the main proceeding is pending. Decisions on interim measures, whether granting or rejecting the application, may be appealed (Section 669-terdecies), on the grounds that they are flawed, or by submitting to the appeal court additional circumstances and grounds not included in the initial application.

#### **g. Court directed settlement option during procedure**

The Court does not expressly direct any settlement option during the procedure.

According to paragraph 15 of art. 140bis, "Waivers/releases or settlements between the parties are at no prejudice of the participants who have not expressly consented. The same applies if the action is discontinued or otherwise terminated early". There is no judicial supervision of the content of the settlement, nor any provision for the prosecution of the action by non-consenting parties. In addition, a provision according to which a settlement, as well an out-of-court settlement with a procedural discontinuation of the action, has no effect on the rights of non-consenting participants. There is no requirement that the settlement be made available to participants, nor that it must cover all participants and not the parties themselves, although this is most likely a matter of debate for the courts.

So far, only one action has been concluded with a settlement. On March 21, 2016, the Tribunale di Roma admitted an action (Art. 140-bis) brought by a consumer association against a telecommunication provider (Wind) for compensation after a blackout of services occurred on June 13, 2014. The certification was revoked and the action discontinued, following an order of 26 May 2016, due to an undisclosed and unsupervised settlement.

It should be noted that a settlement prevents another *azione di classe* being brought (by others) against the same defendant, for the same facts, only if it is made after the term for opting-in contained in the ordinance admitting the action has expired (art. 140-bis, paragraph 14). A settlement made before such term expires should have the only consequence of terminating that specific action.

#### **h. In case of out of court settlements: judicial control**

Articles 139-140 ICC does not provide for a judicial control in case of out of court settlement.

### **4. Available Remedies**

#### **a. Type of damages**

Only the following remedies are available (Art. 140 ICC):

- a prohibition order against actions damaging to the interests of consumers and users;
- suitable measures to remedy or eliminate the damaging effects of any breaches;
- orders to publish measures in one or more national or local daily newspapers where publicising measures may help to correct or eliminate the effects of any breaches (Art. 140, paragraph 1, letters from a) to c)).

#### **b. Allocation of damages between claimants for compensatory claims/ distribution methods**

In the judgment, the Court shall establish the homogeneous calculation criterion to pay these sums.

#### **c. Availability of punitive or extra-compensatory damages and their conditions**

On the 5th of July 2017, the Italian Supreme Court has for the first time admitted the recognition and enforcement of a foreign judgement providing for the payment of punitive damages. Until now, in fact, the institution of punitive damages had been denied access in our legal system, as deemed to be incompatible with public order, in consideration of the one and only function – economic damages compensation – that was attributed to civil liability. With this judgment (July 5, 2017, No. 16601), the Supreme Court has overturned the previous orientation and given recognition to the multifunctional nature of the Italian civil liability, whose functions of deterrence and sanction are immanent to the system. This also, in light of the several existing provisions which link the amount of the compensation to other factors than the measure of the damage caused (e.g. the tortfeasor's malice or the severity of the offence).

What is more, the Supreme Court redefines the very concept of public order, traditional limits to the application of foreign laws and decisions in the

domestic system, and extends it to encompass the broadest protection of the individual's rights (the victim's ones), pursuable by all the means available and necessary, also in accordance with supranational law.

Still, the Court sets one fundamental condition: to be enforceable, the foreign judgement needs to derive from a legal system where punitive damages are normatively provided, therefore predictable and regulated in such a way that the tortfeasor's procedural and substantial right to defence is not jeopardised.

#### **d. Skimming-off/ restitution of profits**

There are no provisions or cases dealing with the restitution of profits his point is not relevant for the action under Article 140 ICC.

#### **e. Injunctions**

Article 139 provides for injunctions ruling the action for the protection of the consumers' interests. Art- 140-bis ICC does not provide for injunctions.

#### **f. Possibility to seek an injunction and compensation within one single action**

It is not possible to seek an injunction and compensation within one single action.

#### **g. Possibility to rely in an injunction in separate follow-on individual or collective damages actions**

Yes, it is possible to act according to the Article 140-bis ICC.

In particular, the azione di classe may follow a determination of infringement/liability by an administrative authority (e.g. a decision of the Italian Competition Authority). These actions are rare for the moment.

#### **h. Limitation periods**

The ordinary rules applies to the Article 140-bis: 5 years (Tort Law), 10 years (Contract).

### **5. Costs**

#### **a. Basic rules governing costs and scope of the rules**

Art. 91 of the Italian Code of Civil Procedure sets the basic rule concerning cost and fee allocation the Italian civil procedure. At the end of the proceedings, the judge deciding the case on the merits can order the losing party to reimburse the litigation costs incurred by the successful party (Article 91 of the Code of Civil Procedure) at the amount assessed by the judge (the so-called "British Rule"). However, the judge can also decide to set off the expenses when:

- parties are both partly successful; or
- the case involves the examination of complex matters; or
- there are "other serious and exceptional reasons" to be specifically indicated in the judgment.



The “loser pays all rule” also applies in appeal proceedings. This means that if a Court of Appeal issues a judgment in favour of the appellant it has the power to revise the allocation of costs made by lower courts.

**b. Loser Pays Principle (and exceptions from it)**

The general rule is that the loser pays the successful party’s costs (see above).

**6. Lawyers’ Fees**

The Law Decree No. 223/2006 abolished statutory fixed and minimum attorney fees. The system of lawyers’ fees is therefore now open on fee arrangements: negotiations between lawyers and clients are unrestricted although the resulting arrangement should be drawn up in writing. Today, fixed fees and hourly rates as well as percentage fees are allowed.

In particular, as far as percentage fees are concerned, pursuant to the recent Law No. 247/2012, lawyers’ fees can be based on a percentage of the amount awarded in the case, or on a percentage of the possible outcome for the client. This is not a true “contingency fee” but it is an agreement by which the amount of fees is linked to the result of the case. The Law prohibits for lawyers' compensation to be comprised of a share of the asset which is disputed in the case.

It is important to underline that some lawyers or law firms are specialised in representing consumer associations before the Courts. The ordinary rules apply to this case.

**7. Funding**

**a. Availability of funding**

The ordinary rules of civil procedure apply to the *azione di classe*.

The State provides a legal aid system. If a person falls below set financial thresholds, (i.e. if his annual income falls below EUR 10,766.33) they may qualify for free legal assistance and may be exempted from court fees and other charges. In this case, the State pays the costs of the action (namely legal fees and expert fees).

**b. Origins of funding (public, private, third party)**

Public and private funding.

The claimant is not required to disclose its source of funding to the court at the outset of a case.

The court does not have any jurisdiction to review/approve a funding arrangement.

**c. Conditions and frequency of resort to third party funding**

Third party funding is not used in Italy.

**d. Control of funders (Courts/Legislators/Self-regulation)**

Third party funding is not regulated under Italian Law.

**e. Claimant-Funder relationship**

See above.

**8. Enforcement of collective actions/settlements**

**a. Framework for enforcement**

The ruling establishes that the trial is binding upon the members. It is made without any prejudice to the single action of those individuals who do not join *azione di classe*.

**b. Efficient enforcement of compensatory/ injunctive order**

The ordinary rules of civil procedure apply to the enforcement of the judgment following the *azione di classe*.

The enforcement of domestic judgments is governed by the Italian Code of Civil Procedure (CPC). Article 282 states that first instance judgments are provisionally enforceable between the parties to the proceedings and this is the general principle of enforceability of a first instance judgment (starting from publication of the judgment). Enforcement proceedings vary depending on the nature of the assets to be attached or seized. Applicants must appoint an attorney to file an application for a declaration of enforceability.

The enforcing court can review the regularity of the service of the judgment only when the debtor raises its non-conformity as a defence. The service must be performed through the court bailiff, court clerk or any other public processer. Generally, the limitation period for enforcing a judgment is ten years.

With respect to injunctive actions (*azione inibitoria*), the court shall set a deadline for compliance with the obligations set out in the order, and in the event of non-compliance, shall order (at the request of the party who instigated the proceedings or another party) the payment of a sum of money of between € 516 and € 1,032 for each instance of non-compliance or each day of delay, commensurate with the gravity of the breach. In addition, prior to act the consumer association may begin a conciliation procedure at the Chamber of Commerce, Industry, Trade and Agriculture competent for the local area, as well as the other organisms dealing with out-of-court settlement of disputes. In any case, the organisation prepares a conciliation report. In the event of non-compliance with the obligations contained in the conciliation report, the parties may apply to the court by means of proceedings held in chambers so that, having ascertained non-compliance, it may order payment of said sums of money. Such sums of money shall be paid into State funds to be re-allocated by an order of the Ministry of the Economy and Finance to a fund to be set up as part of a special basic budgetary section of the Ministry of Productive Activities to finance initiatives for the benefit of consumers (Art. 139 ICC).

**c. Cross border enforcement**

Yes, it is available although there are no reported cases.

**9. Number and types of cases brought/pending**

There are no official statistics on either of the collective mechanisms.

As far as the *azione di classe* under art. 140-bis ICC is concerned, according to the non-official data collected by the Osservatorio Antitrust maintained by the University of Trento<sup>484</sup> since its enactment and as of 12 January 2016 there have been 58 *azione di classe* filed out of which:

- 18 were declared inadmissible and were rejected
- 10 were declared admissible (3 reached the decision)
- 30 are pending at the admission stage

There are also eleven reported decisions by the Court of Appeal, mainly reviewing a decision on inadmissibility of courts of first instance.

Finally, there are two reported decisions by the Supreme Court:

- an interlocutory order by the Third Chamber of the Supreme Court requesting the President of the Court to refer a certain legal issue (the possibility to reintroduce an *azione di classe* once it has been declared as inadmissible) to the Joint Chamber of the Supreme Court for an authoritative decision.<sup>485</sup>
- a decision on the difference between the *azione di classe* pursuant to art. 140-bis ICC and the "public class action" of the Law 198/2009.<sup>486</sup>

## **10. Impact of the Recommendation/Problems and Critiques, including**

### **a. Consequences where no collective redress mechanism is available**

Injunctive Collective redress is available through the action ruled by Article 140 ICC. The Recommendation had no impact in this respect.

The *azione di classe* is scarcely used in practice. There have been only few cases and only a very small portion reached a decision on the merits. Even those cases that reached the decision on the merits, only in one case there were more than 100 members in the class (it is reported that the travel agency that was ordered to pay compensation to these 100+ members, filed a petition for bankruptcy).

### **b. Impact of the collective mechanism (or lack of) on behaviour/policy of stakeholders (direct/ indirect, economic/social impact)**

The action has had a positive outcome in advancing consumer interests in the Italian legal system. Before the entering into force of Art. 140-bis ICC there was no specific action for compensatory collective damages. Only traditional remedies were available, depending upon the circumstances of the case, such as the joinder of parties ('*litisconsorzio*') and the possibility to bring a civil action into a criminal proceeding. Indeed, the offices of the public authorities and, particularly, the Attorney-General ("Pubblico Ministero") play a major role in protection of consumer rights by 'acting' as substitutes for compensatory collective redress. When private parties join criminal proceedings, they can benefit from the evidence offered by the prosecutors and can thus minimize the burden of persuading the court (a burden that in any event stays with the prosecutor). However, civil claimants' compensation depends on conviction. In criminal actions the standard of proof is different

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<sup>484</sup> <http://www.osservatorioantitrust.eu/it/azioni-di-classe-incardinate-nei-tribunali-italiani/>

<sup>485</sup> Cassazione civile, sez. III, order of 24 April 2015 n. 8433

<sup>486</sup> Cassazione civile, sez. un., 30 September 2015 n. 19453 reported in *Foro Amministrativo* 2015, II, 11, 2745 (s.m) in *Foro italiano* 2015, 9, I, 2778 (s.m.)

because proof beyond a reasonable doubt is required. In contrast, standards of proof in civil cases are more relaxed - even though, at least in Italy, they are usually stricter than the standard of the preponderance of evidence. In other words, this type of action is not structured to recover consumers' damages in a mass-fault scenario and the outcome has often been insufficient.

### **c. Incompatibilities with the Recommendation's principles**

#### **Standing**

Article III. 4 ( c ) of the Recommendation states that *the entity should have sufficient capacity in terms of financial resources, human resources, and legal expertise, to represent multiple claimants acting in their best interest.*

Consumer associations seriously lack financial and human resources in Italy.

Article III. 7 of the Recommendation provides that *In addition, or as an alternative, the Member States should empower public authorities to bring representative actions.*

Public authorities are not bringing representative actions in Italy.

#### **Admissibility**

The Courts apply a strict interpretation of the admissibility requirements. This is clear by analysing the case law. It is of note that, in the few cases that reached a decision on the merits, Italian courts showed a tendency to narrowly interpret the formal requirements for being included in the class, excluding many participants because, for example, they lacked a verification of their signature. As a result, classes have been generally composed of very few members. There has only been one case in which the group comprised more than 100 members (a case decided by the Tribunal of Naples, section XII, 18 February 2013 no. 2195, *M. v. W.*, (2013) 12 *Guida al diritto*, 16).

#### **Information on a collective redress action**

Dissemination methods are very poor in Italy. The public administration (both central and local offices) has no financial resources to fund initiatives to make consumers aware of the action and consumer associations are the only bodies in disseminating information.

#### **Funding**

The lack of funding limits the enforcement of consumer interests according to Article 14o ICC.

### **d. Problems relating to access of justice/fairness of proceedings including**

#### **Restrictions on access to justice negatively affecting collective redress**

Only authorized association may bring an action (Art. 139 ICC). However, the main restriction for consumers is the cost of the litigation and the lack of funding.

#### **Time and burden of collective actions on courts and parties compared to non-collective litigation**

The main shortcomings of this mechanism are the costs of the proceedings and the length of time to obtain a judgment.

### **Risks of and examples for abusive litigation**

Reports indicate few cases of azione di classe. No risks have emerged in the litigation.

### **Effective right to obtain compensation**

See the point before.

## **II. Sectoral Collective Redress Mechanism against the public administration ('azione per l'efficienza delle amministrazioni pubbliche e dei concessionari pubblici')**

### **1. Scope/ Type**

#### **a. Horizontal/ sectoral**

The restoration of the correct development of the public function is the ratio of the Legislative Decree of 20 December 2009 No. 198 issued to implement the legislative delegation contained in Law No.15 of 4th March 2009. The Law introduced into the Italian law system the institution of a public collective action against the public administration.

The possibility to pursue the collective action is allowed only against the public administration if citizens, addressees of functions and services, complain inefficiencies of Administration due to the failure to comply with the deadlines provided for the adoption of an administrative act required, or to provide services to an adequate standard.

The action concerns, for example:

- the breach of relevant interests for a plurality of users
- the breach of qualitative and economic standards (i.e.: the obligations contained in the so-called Charter of public services) or the violation of the terms, or
- the failure to issue a general administrative act (in this case, the object of judgment is closely linked to the prior definition of minimum quality levels).

#### **b. Injunctive or compensatory or both**

The main goal of the collective action is not the provision of compensation. Rather, the aim is to provide a kind of external judicial control on the compliance, of the Administration, with the levels of quality, cost effectiveness, timeliness imposed on them, ensuring, in practice, the performance of public actions for the benefit of whole community.

## **2. Procedural Framework**

### **a. Competent Court**

The plaintiff must file a complaint with the administrative courts.

### **b. Standing**

The pursuit of the action is provided, for people that have a direct interest, concrete, and corresponding to a situation legally protected, and for associations and committees thereby protecting the interests of its associates.

### **c. Availability of Cross Border collective redress**

The participation of foreign plaintiffs is possible, but rarely used.

### **d. Opt In/ Opt Out**

#### **Principal availability of either/or/both options?**

The participation mechanism is opt-in.

### **e. Main procedural rules**

#### **Admissibility and certification criteria**

The claimant is obligated, prior to the commencement of the action, to send to the Administration a preventive warning – with which he reveals the collective claim – in order to allow to the P. A. to repair the defects complained

#### **Single or Multi-stage process**

Single-stage process.

#### **Case-management and deadlines**

The ordinary rules of administrative procedure apply.

#### **Expediency (particularly in injunctive cases)**

The ordinary rules of administrative procedure apply.

#### **Evidence/discovery rules**

The ordinary rules of administrative procedure apply.

#### **Interim measures**

Interim measures are available according to the ordinary rules of administrative procedure.

#### **Court directed settlement option during procedure**

The Court does not expressly direct the settlement option during the procedure.

#### **In case of out of court settlements: judicial control**

Article 140-bis does not provide for a judicial control in case of out of court settlement.

### **3. Available Remedies**

#### **a. Type of damages**

After the delivering judgment it is contemplated the activation of some procedures to individualize people that caused the inefficiency censored (in order to charge their responsibilities in the following disciplinary proceedings); furthermore, is established the transmitting of an office communication to the Italian Corte dei Conti and to the Commission for evaluation, transparency and integrity of the public administration-

The public administration has to comply with the judgment (if the latter continue to be unfulfilling), according to the principles of administrative process. There is no provision for punitive damages under Italian law. It is important point out, for completeness, that there is a strong limitation to pursue this action that expressly prohibits to advance actions for damages against the public administration.

#### **b. Allocation of damages between claimants for compensatory claims/ distribution methods**

See above

#### **c. Availability of punitive or extra-compensatory damages and their conditions**

See above

#### **d. Skimming-off/ restitution of profits**

See above

#### **e. Injunctions**

See above

#### **f. Possibility to rely in an injunction in separate follow-on individual or collective damages actions**

Yes, it is possible to act also according to Article 139 and Article 140-bis.

#### **g. Limitation periods**

The ordinary rules apply to the Article 140-bis: 5 years (Tort Law), 10 years (Contract).

### **4. Costs**

#### **a. Basic rules governing costs and scope of the rules**

The ordinary rules of the administrative process apply also with respect to the costs.

#### **b. Loser Pays Principle (and exceptions from it)**

See above

## **5. Lawyers' Fees**

See section above

## **6. Funding**

See section above.

## **7. Enforcement of collective actions/settlements**

### **a. Framework for enforcement**

The ordinary rules of administrative procedure apply.

### **b. Efficient enforcement of compensatory/ injunctive order**

The ordinary rules of administrative procedure apply.

### **c. Cross border enforcement**

There are no reported cases of cross border enforcement.

## **8. Number and types of cases brought/pending**

There are no official statistics. Since its introduction, this action has strongly been called into question for its practical limits, especially considering the absence of any effective mechanism for obtaining compensation against the public administration.

## **9. Impact of the Recommendation/Problems and Critiques, including**

Collective redress is available as described at the point before (Art. 139-140 ICC and Art. 140 ICC). The Recommendation had no impact in this respect.

### **Impact of the collective mechanism (or lack of) on behaviour/ policy of stakeholders (direct/ indirect, economic/social impact)**

The action against the public administration is scarcely used in practice.

#### **a. Incompatibilities with the Recommendation's principles**

See above

#### **b. Problems relating to access of justice/fairness of proceedings including**

### **Restrictions on access to justice negatively affecting collective redress**

The Courts apply the admissibility requirements in a strict interpretation. This is clear by analysing the case law. See above for further information



## **Time and burden of collective actions on courts and parties compared to non-collective litigation**

See above

## **Risks of and examples for abusive litigation**

Reports indicate few cases. No risks have emerged in the litigation.

## **Effective right to obtain compensation**

See above, there is no right to obtain compensation against a public authority

# **III. Information on Collective Redress**

## **1. National Registry**

There are no official statistics on the collective mechanisms.

As far as the *azione di classe* under art. 140-bis, ICC is concerned, according to the non-official data collected by the Osservatorio Antitrust maintained by the University of Trento (<http://www.osservatorioantitrust.eu/it/azioni-di-classe-incardinate-nei-tribunali-italiani/>)

## **2. Channels for dissemination of information on collective claims**

Generally, the consumer association advises the consumer(s) about the judicial and non-judicial options to protect their rights and interests. This advice is provided online, off-line (e.g. brochures, newsletters) and in person.

# **IV. Case summaries**

The cases are summarised in two sections according to the competent court, i.e. Italian Supreme Court, Court of Appeal, and Tribunal.

Please note the section concerns, and is limited to, the leading cases under Italian Law, especially those decided after the year 2013.

The most recent cases concern, in particular, the *azione di classe* according to the Article 140-bis of the Italian Consumer Code.

## **Italian Supreme Court (Corte di cassazione)**

<b>Case name</b>	<b>Keywords</b>
<b>Codacons v. Soc. Bat Italia</b>	Consumer association – Standing – Procedural issues

<p>Cass. civ., sez. III, 24.04.2015, n. 8433</p> <p><b>Reference</b></p> <p>Responsabilità Civile e Previdenza, 2016, 2, 550</p> <p><b>Subject area</b></p> <p>Consumer Law – Health – Tobacco Litigation</p>	<p><b>Summary of claims</b></p> <p>The action launched by Codacons focused on compensation of damages due to addictive smoking.</p> <p>The case was focused on the class action brought in 2010 by Codacons and other subjects against British American Tobacco (BAT) in respect of an alleged addiction to smoking generated by the defendant. Therefore, the claimants sought the reimbursement of damages. According to the claimants, American Tobacco engaged in hazardous activities by producing and marketing cigarettes without exercising the duly precautionary measures to protect the smokers' health. On the merits, the trial court rejected the claims in the light of the reasons listed hereunder:</p> <p>(i) the rights enforced did not meet the identical requirement stated under section 2 of art. 140-bis;</p> <p>(ii) there were no proof of the material damage suffered;</p> <p>(iii) the alleged facts occurred before Art. 140-bis came into force.</p>
<p><b>Dispute resolution method</b></p> <p>Article 140-bis ICC</p> <p><b>Court or tribunal</b></p> <p>Cassazione civile</p>	<p>The appellate court accepted the reasoning of the trial court and confirmed the decision (Decision of Appeal issued in January 27.01.2012). The Court of Cassation stated that a class action which had been declared inadmissible by a Court of Appeal, cannot be challenged in the Court of Cassation because it is not a real decision on the merit, but instead a procedural statement (decisione di rito) which does not fall under the Court of Cassation competences .</p>
<p><b>Cross-border character/ implications, if any</b></p> <p>No</p>	
<p><b>Opt-in</b></p> <p>Yes</p>	<p><b>Findings</b></p>
<p><b>Type of funding</b></p> <p>Public</p>	<p>The Court of Appeal, confirming the decision of the Tribunale on partially different grounds, held that, beside the action being barred <i>ratione temporis</i>, the damages suffered by each participants lacks uniformity and therefore were not "identical".</p>
<p><b>Costs</b></p> <p>Yes, loser pays principle applies</p>	<p>Codacons made a petition to the Supreme Court that, disagreeing with its own earlier decision, in 2015 submitted the matter to the attention of the First President of the Court for a possible decision of the</p>

<p><b>Abusive litigation</b></p> <p>No</p>	<p>issue by the Joint Chambers, not yet made.</p> <p>Regardless, some of the statements made by the Court in its order are particularly interesting and deserve attention. The Court noted:</p> <p>` it is not appealing to conclude that the azione di classe is merely a procedural form of judicial protection of rights, alternative and equal to individual action, so that once declared admissible the former, the possibility to bring the latter would prevent to consider a declaration of inadmissibility to have the content of a decision and to be final. If, in fact the Court deems it reductive to read in [...] art. 140-bis just an alternative procedural 'form' [...]'.</p> <p><b>Outcomes</b></p> <p>Codacons made a petition to the Supreme Court that, disagreeing with its own earlier decision, in 2015 submitted the matter to the attention of the First President of the Court for a possible decision of the issue by the Joint Chambers, not yet made.</p> <p>Settlement: no</p> <p>Remedy: damages</p> <p>Amount of damages awarded: no</p> <p>Distribution of damages: no</p>
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<p><b>Case name</b></p> <p><b>Codacons v. Intesa Sanpaolo</b></p> <p>Cass. civ., sez. I, 14.06.2012, n. 9772</p> <p><b>Reference</b></p> <p>Foro it., 2012, I, 2304, commented by De Santis,</p>	<p><b>Keywords</b></p> <p>Consumer association – Standing – Procedural issues</p> <p><b>Summary of claims</b></p> <p>The first azione was against a bank (Intesa S. Paolo) for allegedly illegitimate banking fees.</p> <p><b>Findings</b></p> <p>The action was declared inadmissible both at the first</p>
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<p>Giust. civ., 2012, I, 1667</p> <p><b>Subject area</b></p> <p>Consumer Law – Banking services</p>	<p>instance and on appeal. The first judge held that the plaintiff's right had not been harmed, and hence lacked standing to bring the action, regardless of whether other potential future members of the class did in fact suffer a damage. The Court of appeal confirmed and, thus, Codacons petitioned the Corte di cassazione, which, however, held that there is no appeal against the order of inadmissibility by the Court of appeal.</p>
<p><b>Dispute resolution method</b></p> <p>Article 140-bis ICC</p> <p><b>Court or tribunal</b></p> <p>Cassazione civile</p>	<p><b>Outcomes</b></p> <p>The Court of appeal confirmed and, thus, Codacons petitioned the Corte di cassazione, which, however, held that there is no appeal against the order of inadmissibility by the Court of appeal.</p>
<p><b>Cross-border character/ implications, if any</b></p> <p>No</p>	<p>Settlement: no Remedy: damages Amount of damages awarded: no Distribution of damages: no</p>
<p><b>Opt-in</b></p> <p>Yes</p>	
<p><b>Type of funding</b></p> <p>Public</p>	
<p><b>Costs</b></p> <p>Yes, loser pays principle applies</p>	
<p><b>Abusive litigation</b></p> <p>No</p>	

**Court of appeal (Corte di appello)**

<p><b>Case name</b></p> <p><b>Masciullo e altri v. Monte dei Paschi Siena</b></p> <p>Corte appello Firenze 15 July 2014</p> <p><b>Reference</b></p> <p>Foro it, 2015, 9, 2778</p> <p><b>Subject area</b></p> <p>Consumer Law – Securities</p>	<p><b>Keywords</b></p> <p>Consumer association – Standing – Procedural issues – Securities</p> <p><b>Summary of claims</b></p> <p>As widely known, a substantial portion of US class action go under the label of “securities class action” aimed at settling mass disputes between a company and its scattered shareholding. The Italian azione di classe does not expressly include or exclude securities, but gives standing only to “consumers or users” and limits its objective scope. Precisely, there have been two attempts at bringing securities actions under the Art. 140-bis.</p> <p>The first attempt involved an action brought by a consumer association (ADUSBEF) against one of Italy’s major bank (Monte dei Paschi di Siena – MPS), currently experiencing hard times.</p>
<p><b>Dispute resolution method</b></p> <p>Article 140-bis ICC</p> <p><b>Court or tribunal</b></p> <p>Corte di appello Firenze</p>	<p><b>Findings</b></p> <p>The Court of appeal of Florence, confirming the lower court, held that, when the subject matter of the claim is stock options, potential class members are acting as shareholders and cannot be considered “consumers or users”; the claim, therefore, is outside the scope of art. 140-bis.</p>
<p><b>Cross-border character/ implications, if any</b></p> <p>No</p>	<p><b>Outcomes</b></p> <p>Similarly to Dieselgate and other cases, it is reported that also for MPS other consumer associations are trying to exploit criminal proceedings already pending in Milano, by gathering potential victims and have them participating to the criminal trial with their civil claim for damages.</p>
<p><b>Opt-in</b></p> <p>Yes</p>	
<p><b>Type of funding</b></p> <p>Public / Consumer association</p>	<p>Settlement: no Remedy: damages</p>

	Amount of damages awarded: no
<b>Costs</b> Yes, loser pays principle applies	Distribution of damages: no
<b>Abusive litigation</b> No	

<b>Case name</b>  Gasca et al. v Intesa Sanpaolo  Corte di appello Torino 30 June 2013  <b>Reference</b>  Corte d'appello Torino, 30 June 2016, at <a href="https://www.altroconsumo.it/organizzazione/-/media/lobbyandpress/altroconsumo/images/in-azione/class-action/intesa%20sanpaolo/sentenza%20corte%20appello%202016/sentenza%20nella%20causa%20civile%20d'appello%20r,-d,-g,-d-,%20n,-d-,%201505_2014.pdf">https://www.altroconsumo.it/organizzazione/-/media/lobbyandpress/altroconsumo/images/in-azione/class-action/intesa%20sanpaolo/sentenza%20corte%20appello%202016/sentenza%20nella%20causa%20civile%20d'appello%20r,-d,-g,-d-,%20n,-d-,%201505_2014.pdf</a> (last visited 13 Jan 2017).  Subject area Consumer Law – Banking Services	<b>Keywords</b>  Consumer association – Standing – Procedural issues – Banking Services  <b>Summary of claims</b>  Altroconsumo is another leading consumer's association, which is still particularly active in exploring the potential of the Italian class action. The first azione launched by Altroconsumo was against a major Italian bank. The first part of the script is a common one: the Tribunale di Torino declared the action inadmissible (for lack of identity of the claims, insufficient resources of plaintiff to carry out the proceedings, and denying the standing of the association), while the Corte di appello di Torino allowed it, interpreting the requirement of identity in terms of "homogeneity". In what is one of the first decision on the azione di classe, the court held that the "identity" of the claims has to be referred only to the nature of the objective elements that identify the action, but does not extend to the amount claimed by each participants, which can be different. It also noted that, although the members of the class did not show adequate resources, the participation of a renowned association cleared both the requirement of resources and the guarantee of adequate representation of the interests of the class.  <b>Findings</b>  The action, thus, returned before the Tribunale that in 2014 decided on the merits, holding that in fact the bank had inserted unfair terms in its contracts, but rejected most of the 104 participants to the class due
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	to a defect in their participation documents. In fact, the Tribunale required each participant's signature to be authenticated by a public officer, but many did not do it.
<b>Dispute resolution method</b>	<p><b>Outcomes</b></p> <p>In the end, thus, the Tribunale granted the claim of the three "named" plaintiffs and of only three out of 104 participants, ordering the bank to pay sums between € 50,00 and € 430,00 and legal costs of € 36.000,00. The Court of Appeal recently confirmed the decision of the Tribunale.</p> <p><u>Note:</u></p> <p>Altroconsumo launched another action against a bank before the Tribunale di Napoli in 2012, held admissible by both the Tribunale and the Corte d'appello, but the action seems to be still pending on the merits before the first-instance judge (Corte appello Napoli 29.06.2012, Banca Campania v. Assoconsum onlus (2013) 1 I Foro it. 342).</p> <p>Settlement: no Remedy: damages Amount of damages awarded: see before Distribution of damages: see before</p>
Article 140-bis ICC	
<b>Court or tribunal</b>	
Corte di appello di Torino	
<b>Cross-border character/ implications, if any</b>	
No	
<b>Opt-in</b>	
Yes	
<b>Type of funding</b>	
Public	
<b>Costs</b>	
Yes, loser pays principle applies	
<b>Abusive litigation</b>	
No	

<b>Case name</b>	<b>Keywords</b>
Associazione Codici Onlus e Centro diritti cittadino v Società Trenord	Consumer association – Standing – Procedural issues - Railways

<p><b>Reference</b></p> <p>Corte di Appello di Milano, 3 March 2014</p> <p>Foro it., 2014, I, 5, 1619</p> <p>Subject area consumer law, railway sector</p> <p><b>Dispute resolution method</b></p> <p>Article 140-bis ICC</p> <p><b>Court or tribunal</b></p> <p>Corte di appello Milano</p> <p><b>Cross-border character/ implications, if any</b></p> <p>No</p> <p><b>Opt-in</b></p> <p>Yes</p> <p><b>Type of funding</b></p> <p>Public</p> <p><b>Costs</b></p> <p>Yes, loser pays principle applies</p> <p><b>Abusive litigation</b></p> <p>No</p>	<p><b>Summary of claims</b></p> <p>The action brought by this association was against a train service provider, Trenord, for a series of issues occurred in December 2012 that led to significant delays and discomfort for travellers. The Tribunal of Milan has declared the action inadmissible in 2013 for lack of homogeneity, but the Court of Appeal overturned such order in 2014 and sent back the case to the first judge for a decision on the merits. The Court's reasoning follows the line of the decision of the Court of appeal of Torino above, specifying that «homogeneity of claims ..., during the admissibility phase, in which issues of quantification are not relevant, is satisfied if the source of damages is the same for all and the quantification appears to be possible on the basis of uniform criteria ». The Court adds that the participation to a class action implies a certain degree of "standardisation" of each individual claim, which loses part of its specificity.</p> <p><b>Findings</b></p> <p>On the merits, the court rejected the claims, stating that the extra-judicial compensation already offered by Trenord to users (a reimbursement of 25% the price of a train pass) was enough. Interestingly, there had been around 6.130 participants that opted-in over a potential class of around 700.000. It is reported that appeal on the merits is pending.</p> <p><b>Outcomes</b></p> <p>Two other actions were declared inadmissible, one in Rome the other in Florence. Both aimed at recovering illegitimate VAT paid by users to waste service companies in Italy, but both courts found the action to be outside the scope of art. 140bis and therefore inadmissible.</p> <p>Settlement: no</p>
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	Remedy: damages Amount of damages awarded: no Distribution of damages: no
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### **Tribunal (Tribunale)**

<p><b>Case name</b></p> <p>Martina Marinari, Letizia Benedetta Ghizzi Panizzi (who purchased a Volkswagen car and are represented by Altroconsumo) and Volkswagen AG and others</p> <p><b>Reference</b></p> <p>Tribunale Venezia, Order issued on 25 May 2017</p> <p>Reported</p> <p><b>The Order is accessible at</b></p> <p><b><a href="http://www.foroitaliano.it/wp-content/uploads/2017/05/trib-venezia-.pdf">http://www.foroitaliano.it/wp-content/uploads/2017/05/trib-venezia-.pdf</a></b></p> <p>Subject area</p> <p>consumer law, automotive, toxic gas emissions, Certification of the azione di classe</p>	<p><b>Keywords</b></p> <p>Consumer association – Standing – Procedural issues</p> <p><b>Summary of claims</b></p> <p>The case at issue constitutes the outcome in the Italian legal system of the worldwide scandal so called “dieselgate”, which broke on 18 September 2015 in the United States. The Germany company has admitted to have provided some models of her cars with a defeat device in order to cheat on the real level of emission of the NOX gas during regulatory testing.</p> <p><b>Findings</b></p> <p>The azione di classe was filed by Altroconsumo alleging the unfair commercial practice perpetrated by Volkswagen AG and its Italian distributor, as already ascertained by a decision of the Italian Competition Authority (ICA) who condemned both defendants to pay a fine of 5 milion euro. The decision of the ICA is PS10211 - VOLKSWAGEN-EMISSIONI INQUINANTI AUTOVEICOLI DIESEL no. 26137</p> <p>Therefore the class action is requested in order to claim for compensation of the damages allegedly caused by this unfair commercial practice and consisting in the loss of value of the cars purchased plus the moral damages related to the fact that these cars are not ecology friendly as pretended in their marketing.</p>
<p><b>Dispute resolution method</b></p> <p>Article 140-bis ICC</p>	

<p><b>Court or tribunal</b></p> <p>Tribunale di Venezia, Sez III, issued the Order under the procedure no. 3711/2016</p>	<p>The Tribunale di Venezia allowed the action having considered the homogeneity of the claimants legal titles, with explicit reference to the decision of the Corte d'appello di Torino 30 June 2016 and the decision of the Corte d'appello di Milano 3 March 2014. In particular, the Tribunale di Venezia affirmed that the requirement of homogeneity is fulfilled whenever the cause of the damage is common to all the participants to the class action and each compensation can be calculated on the basis of an objective criteria (and therefore despite the fact that each individual compensation is not equal to the others). Furthermore the Tribunale di Venezia considered that the claim is not prima facie groundless since Volkswagen has marketed the product with specific green claims pretending to be eco-friendly.</p> <p><b>Outcomes</b></p> <p>The action is still pending</p> <p>Settlement: No</p> <p>Remedy: No</p> <p>Amount of damages awarded: No</p> <p>Distribution of damages: No</p>
<p><b>Cross-border character/ implications, if any</b></p> <p>No</p>	
<p><b>Opt-in</b></p> <p>Yes</p>	
<p><b>Type of funding</b></p> <p>Public</p>	
<p><b>Costs</b></p> <p>Yes, loser pays principle applies</p>	
<p><b>Abusive litigation</b></p> <p>No</p>	

<p>Case name</p> <p>Mr. Vighenzi (who purchased a Volkswagen car and is represented by Altroconsumo) v. Volkswagen AG and others</p> <p>Reference</p> <p>Tribunale Venezia, sez. III, 12</p>	<p><b>Keywords</b></p> <p>Consumer association – Standing – Procedural issues</p> <p><b>Summary of claims</b></p> <p>The case at issue constitutes the outcome in the Italian legal system of the worldwide scandal: the Volkswagen emissions scandal</p>
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<p>January 2016</p> <p>Reported in</p> <p>Foro it., 2016, I, 1017</p> <p>Subject area</p> <p>consumer law, automotive, fuel emissions, Certification of the azione di classe</p>	<p>broke on 18 September 2015 in the United States (the so-called "dieseldgate"). Basically, the German company was found responsible for having produced cars with higher levels of pollution emission than what publicly provided.</p> <p><b>Findings</b></p> <p>The azione di classe was filed by Altroconsumo against an unfair commercial practice perpetrated by Volkswagen AG and sanctioned by the Italian Competition Authority and its Italian distributor consisting in a public declaration of incorrect data about emissions and fuel consumption with reference to the cars produced and marketed since October 2012 by Volkswagen. Furthermore, the claimants asked for the reimbursement of the damages.</p>
<p><b>Dispute resolution method</b></p> <p>Article 140-bis ICC</p> <p><b>Court or tribunal</b></p> <p>Tribunale di Venezia</p>	<p>In first place, the trial court rejected the action in the light of the fact that the mere purchase of a cars of the same model is not sufficient per se to meet the homogeneity requirement necessary for a class action. Indeed, the Court found a lack of homogeneity between the interests of the plaintiff and those of the members of the class. The Court stated that the monetary damages arising from the alleged unfair commercial practice pursued by Volkswagen are dependent upon several specific circumstances which vary on a case-by-case basis and are not related to the purchase decision (such as, the driving style, the actual state of the vehicle, the road surface, use of safety equipment). Therefore, the Court held that the facts and the type of remedy sought in the lawsuit could not be considered the same for every member of the class.</p>
<p><b>Cross-border character/ implications, if any</b></p> <p>No</p>	<p>Secondly, the alleged misconduct of Volkswagen AG has been deemed by the Court purely speculative and based on generic and unproven assumptions.</p>
<p><b>Opt-in</b></p> <p>Yes</p>	<p>Lastly, the Court stated the inadmissibility of the action against Volkswagen Italia, in its capacity of distributor of Volkswagen cars in the Italian market since the lack of any demonstrable link between the knowing misrepresentation of the emissions and fuel consumption data by the parent company</p>
<p><b>Type of funding</b></p> <p>Public</p>	
<p><b>Costs</b></p> <p>Yes, loser pays principle applies</p>	
<p><b>Abusive litigation</b></p> <p>No</p>	

	<p>(Volkswagen AG) and the Italian distributor.</p> <p><b>Outcomes</b></p> <p>As a consequence of the decision, Altroconsumo has been sentenced to pay two thirds of the defendant legal fees.</p> <p>Settlement: no Remedy: damages Amount of damages awarded: no Distribution of damages: no</p>
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<p><b>Case name</b></p> <p>Silesu et al. v. Abbanoa S.p.A,</p> <p>Tribunale di Cagliari 17 October 2016</p> <p><b>Reference</b></p> <p>available at <a href="http://www.sviluppoeconomico.gov.it/images/stories/documenti/Ordinanza_3160-15-class-action-ABBANOVA.pdf">http://www.sviluppoeconomico.gov.it/images/stories/documenti/Ordinanza_3160-15-class-action-ABBANOVA.pdf</a></p> <p><b>Subject area</b></p> <p>Consumer Law – Water Supply</p>	<p><b>Keywords</b></p> <p>Consumer association – Standing – Procedural issues – Water Supply</p> <p><b>Summary of claims</b></p> <p>Water supply has been the focus of at least three actions (Art. 140-bis).</p> <p><i>Tribunale Roma sez. II 02.05.2013, Contucci et al. v. Com. Montenero di Bisaccia, in (2014) 3 Responsabilità Civile e Previdenza 965, and Foro italiano 2014, 1, I, 274.</i></p> <p>In the first, some of the citizens of a small village in Molise remained without drinkable water for a few days across 2011 New Year’s Eve and asked restitution of fees paid for the water supply service, as well as damages. The court declared the action admissible, and the municipality (Comune) was allowed to join into the proceedings the utilities companies that manage the water supply (that in turn called their insurance providers). On the merits, however, the court ruled that in fact the issue was caused by unforeseen events</p>
<p><b>Dispute resolution method</b></p> <p>Article 140-bis ICC</p> <p><b>Court or tribunal</b></p>	

Tribunale di Cagliari	and that the municipality, which did not have the responsibility for supplying the water, had done all it could to protect its citizens and minimize any damage. Furthermore, plaintiff failed to extend their claims to the other parties (i.e., utilities companies), although – in any case – according to the judge the claim had no merits.
<b>Cross-border character/ implications, if any</b>  No	A similar action has been promoted also against the Comune di Petacciato for similar facts, but there is no record of a decision on the merits.
<b>Opt-in</b>  Yes	<i>Tribunale di Roma, 02.05.2013, Casalanguida v. Comune di Petacciato, available at <a href="http://www.consumatoridirittimercato.it/wp-content/uploads/2013/06/Petacciato.pdf">http://www.consumatoridirittimercato.it/wp-content/uploads/2013/06/Petacciato.pdf</a></i>
<b>Type of funding</b>  Public	
<b>Costs</b>  Yes, loser pays principle applies	On a different perspective, the Court of appeal of Florence in an action brought by citizens/users against the service utilities company for failure to properly act when a heavy, but expected, snow covered the city in white. There, the court adopted an opposite reasoning: since the contractual relationship is between the city and the service utilities company, while citizens are a third party, then the action was inadmissible.
<b>Abusive litigation</b>  No	<p><b>Findings</b></p> <p>The Tribunale di Cagliari has recently declared a second action involving water supply issues admissible. A group of 127 users have gathered together with one law firm to bring proceedings against Abbanoa S.p.a., water service provider, claiming lack or in-sufficient supply of water in the area of Buggerru, Sardinia.</p> <p><b>Outcomes</b></p> <p>The court admitted the action only for the claim of restitution of all sums paid in the five years before the action and on the equitable damage for lack of availability of these sums. Other claims of damages, which had not been fully described by the plaintiffs, were not</p>

	<p>"certified" because the court found it impossible to assess the requirement of homogeneity. Decision on the merits is now pending.</p> <p>Settlement: no</p> <p>Remedy: damages</p> <p>Amount of damages awarded: no</p> <p>Distribution of damages: no</p>
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<p>Case name</p> <p><b>Altroconsumo v. FCA</b></p> <p>Corte appello Torino, 17 November 2015</p> <p>Reference</p> <p>Foro it., 2016, I, 1017</p> <p>Subject area</p> <p>consumer law, automotive, fuel emissions, Certification of the azione di classe</p>	<p><b>Keywords</b></p> <p>Consumer association – Standing – Procedural issues</p> <p><b>Summary of claims</b></p> <p>Altroconsumo has launched two actions (Art. 140-bis) against car manufacturers in Italy. The first is against FCA in Torino, where the Court of Appeal, with a very well reasoned decision, overturned the Tribunal order of inadmissibility and directly admitted the action, mandating for the first-instance to carry out the merits phase.</p> <p>Altroconsumo claims that it filed with the Tribunale di Torino 21.031 declarations of participation.</p>
<p><b>Dispute resolution method</b></p> <p>Article 140-bis ICC</p> <p><b>Court or tribunal</b></p> <p>Tribunale di Torino</p>	<p><b>Findings</b></p> <p>The action is admissible.</p> <p><b>Outcomes</b></p>
<p><b>Cross-border character/ implications, if any</b></p> <p>No</p>	<p>Not available to date</p> <p>Settlement: no</p>

	Remedy: damages
<b>Opt-in</b> Yes	Amount of damages awarded: no Distribution of damages: no
<b>Type of funding</b> Public	
<b>Costs</b> Yes, loser pays principle applies	
<b>Abusive litigation</b> No	

<b>Case name</b>  Altroconsumo v. AMA  Tribunale di Roma, 10 November 2014	<b>Keywords</b>  Consumer association – Standing – Procedural issues - VAT
<b>Reference</b>  available at <a href="https://www.altroconsumo.it/organizzazione/-/media/lobbyandpressaltroconsumo/images/in-azione/class-action/iva%20sulla%20tia%20-%20ama%20roma/ordinanza%20di%20inammissibilit%C3%A0/ordinanza%20inammissibilit%C3%A0.pdf">https://www.altroconsumo.it/organizzazione/-/media/lobbyandpressaltroconsumo/images/in-azione/class-action/iva%20sulla%20tia%20-%20ama%20roma/ordinanza%20di%20inammissibilit%C3%A0/ordinanza%20inammissibilit%C3%A0.pdf</a>	<b>Summary of claims</b>  The action aimed at recovering illegitimate VAT paid by users to waste service companies in Italy, but both courts found the action to be outside the scope of art. 140-bis and therefore inadmissible.
<b>Subject area</b>  Consumer Law – Taxation - VAT	<b>Findings</b>  The action was declared inadmissible.
<b>Dispute resolution method</b>	<b>Outcomes</b>  No.  Settlement: no Remedy: damages

<p>Article 140-bis ICC</p> <p><b>Court or tribunal</b></p> <p>Tribunale di Roma</p>	<p>Amount of damages awarded: no</p> <p>Distribution of damages: no</p>
<p><b>Cross-border character/ implications, if any</b></p> <p>No</p>	
<p><b>Opt-in</b></p> <p>Yes</p>	
<p><b>Type of funding</b></p> <p>Public / Consumer association</p>	
<p><b>Costs</b></p> <p>Yes, loser pays principle applies</p>	
<p><b>Abusive litigation</b></p> <p>No</p>	

<p><b>Case name</b></p> <p>Altroconsumo v. AMA</p> <p>Tribunale di Firenze, 18 Marzo 2014 10 November 2014</p> <p><b>Reference</b></p> <p>Tribunale di Firenze, Altroconsumo v. Quadrifoglio Spa, 18/03/2014, available at <a href="https://www.altroconsumo.it/o">https://www.altroconsumo.it/o</a></p>	<p><b>Keywords</b></p> <p>Consumer association – Standing – Procedural issues - VAT</p> <p><b>Summary of claims</b></p> <p>The action aimed at recovering illegitimate VAT paid by users to waste service companies in Italy, but both courts found the action to be outside the scope of art. 140-bis and therefore inadmissible.</p>
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<p><b>Dispute resolution method</b> Article 140-bis ICC</p> <p><b>Court or tribunal</b>  Tribunale di Firenze</p>	
<p><b>Cross-border character/ implications, if any</b></p> <p>No</p>	
<p><b>Opt-in</b> Yes</p>	
<p><b>Type of funding</b> Public / Consumer association</p>	
<p><b>Costs</b> Yes, loser pays principle applies</p>	
<p><b>Abusive litigation</b> No</p>	

<p><b>Case name</b></p> <p>Comitato Tutela del Risparmio v. Banca Carige Spa</p> <p><b>Reference</b></p> <p>Tribunale di Genova, 13 June 2014</p> <p>available at <a href="http://www.osservatorioantitrust.eu/it/wp-content/uploads/2014/06/Ord-Trib-GE_Comitato-c-Carige-2014.pdf">http://www.osservatorioantitrust.eu/it/wp-content/uploads/2014/06/Ord-Trib-GE_Comitato-c-Carige-2014.pdf</a></p> <p>Subject area</p> <p>Consumer Law – Securities</p>	<p><b>Keywords</b></p> <p>Consumer association – Standing – Procedural issues – Securities</p> <p><b>Summary of claims</b></p> <p>The Italian class action does not expressly include or exclude securities, but gives standing only to “consumers or users” and limits its objective scope. Amidst uncertainty, there have been two attempts at bringing securities actions under the Art. 140-bis. Both cases have been reported.</p> <p><b>Findings</b></p> <p>An action was brought against another bank (Carige), but the Tribunale di Genova declared the action inadmissible because the plaintiff lacked standing to sue. Plaintiff in the action was in fact a comitato, a collective association of the bank’s shareholders and stakeholders: the court reasoned that a comitato was neither an association for the purpose of art. 140bis, nor it had a valid power of attorney to sue - and discontinued the action.</p>
<p><b>Dispute resolution method</b></p> <p>Article 140-bis ICC</p> <p><b>Court or tribunal</b></p> <p>Tribunale di Genova</p>	<p><b>Outcomes</b></p> <p>Overall, securities class actions do not seem to fit squarely the current scope of art. 140bis. The courts would hardly allow shareholders’ actions, particularly because the azione di classe is limited by the wording of Art. 140-bis to “consumers or users”. On the contrary, claims based on financial products or other securities distributed to the consumers may well be found to be within the scope – although the immediate defendant of the action will likely be the bank or institution that sold a specific product to the consumer.</p>
<p><b>Cross-border character/ implications, if any</b></p> <p>No</p>	
<p><b>Opt-in</b></p> <p>Yes</p>	
<p><b>Type of funding</b></p>	<p>Settlement: no</p>

Public	Remedy: damages Amount of damages awarded: no Distribution of damages: no
<b>Costs</b> Yes, loser pays principle applies	
<b>Abusive litigation</b> No	

<p><b>Case name</b></p> <p><b>Codacons v. Ristorazione di Milano</b></p> <p>Tribunale di Milano, 2013</p> <p><b>Reference</b></p> <p>Tribunale di Milano, Codacons v. Milano Ristorazione, unreported, 2013, available at <a href="http://www.corteappello.milano.it/allegato_corsi.aspx?File_id_allegato=1283">http://www.corteappello.milano.it/allegato_corsi.aspx?File_id_allegato=1283</a> (last visited 13 May 2017).</p> <p>Subject area Consumer Law – Food – Public Schools</p>	<p><b>Keywords</b></p> <p>Consumer association – Standing – Procedural issues</p> <p><b>Summary of claims</b></p> <p>The azione di classe promoted by Codacons focused on the services of the canteens of schools in Milano.</p> <p><b>Findings</b></p> <p>The Tribunale di Milano in 2013 declared the action inadmissible, on a ground that there was no <i>commonality</i> among the claims. The Court held that the action was manifestly ungrounded. In short, from the moment that individual issues outweighed common issues, it could not be said that the claims were homogeneous – hence the negative decision.</p>
<p><b>Dispute resolution method</b></p> <p>Article 140-bis ICC</p>	<p><b>Outcomes</b></p> <p>It appears that the order was not appealed and became final.</p> <p>Settlement: no</p>
<p><b>Court or tribunal</b></p> <p>Tribunale di Milano</p>	<p>Remedy: damages</p>
<p><b>Cross-border character/</b></p>	

<p><b>implications, if any</b></p> <p>No</p>	<p>Amount of damages awarded: no</p> <p>Distribution of damages: no</p>
<p><b>Opt-in</b></p> <p>Yes</p>	
<p><b>Type of funding</b></p> <p>Public</p>	
<p><b>Costs</b></p> <p>Yes, loser pays principle applies</p>	
<p><b>Abusive litigation</b></p> <p>No</p>	

<p><b>Case name</b></p> <p>M. v. W.</p> <p>Tribunale Napoli, sez. XII, 18 February 2013 no. 2195</p> <p><b>Reference</b></p> <p>Guida al diritto, 2013, no. 16, 12</p> <p><b>Subject area</b></p> <p>Consumer Law - Travel package</p>	<p><b>Keywords</b></p> <p>Consumer association – Standing – Procedural issues – Travel Package</p> <p><b>Summary of claims</b></p> <p>In the first action decided on the merits, the plaintiffs and the participants to the class (it is not clear how many) claimed that a travel agency breached their rights in relation to an “all-inclusive” travel package. In short, the consumers bought a package specifying certain facilities and services in Zanzibar, but once arrived, they have been hosted for three days in a different facility, of lesser quality. They have also spent the rest in the resort, which – however – was still under construction.</p>
<p><b>Dispute resolution method</b></p> <p>Article 140-bis ICC</p>	<p><b>Findings</b></p>

<p><b>Court or tribunal</b></p> <p>Tribunale di Napoli</p>	<p>The Tribunale di Napoli, after admitting the action, ordered the defendant to compensate each of the twelve members of the class admitted to the action a sum of € 1.300,00 (in relation to a package whose cost was € 1.950,00), and a cost order of total € 8.850,00 (for all participants). Soon thereafter, the travel agency filed for bankruptcy.</p>
<p><b>Cross-border character/ implications, if any</b></p> <p>No</p>	<p><b>Outcomes</b></p>
<p><b>Opt-in</b></p> <p>Yes</p>	<p>It is noteworthy that the court adopted a quite restrictive notion of homogeneity, requiring that both the an and quantum of damages being identical/homogeneous. It, therefore, excluded from the class around thirty consumers who were hosted in a different structure because their damages were found not to be identical as to the quantum (and due to lack of evidence, that such facility was not adequate).</p>
<p><b>Type of funding</b></p> <p>Public</p>	
<p><b>Costs</b></p> <p>Yes, loser pays principle applies</p>	<p>Settlement: no Remedy: damages Amount of damages awarded: no</p>
<p><b>Abusive litigation</b></p> <p>No</p>	<p>Distribution of damages: no</p>

# LATVIA – FACTSHEET

## **Scope**

There is no specific horizontal collective redress mechanism.

For consumers, there is an out-of-court collective redress controlled by the state institution: Consumer Rights Protection Centre. It is solely injunctive, compensatory is available only if the trader signs written commitment acknowledging the violation.

## **Problems/Incompatibilities with Recommendation principles**

In many cases, traders do not sign the written commitment because they disagree with the decision of the Consumers Rights Protection Centre, thus there is no compensation paid to the consumers.

## **Standing** (Para. 4-7)

The Consumer Rights Protection Centre has competence to grant the injunction and set the penalty in cases where a violation of the consumer rights affects the collective interests of consumers.

## **Problems/Incompatibilities with Recommendation principles**

Doubts whether the Centre can detect all violations.

## **Admissibility** (Para. 8-9)

There are no specific rules of the absence of a horizontal collective redress mechanism.

## **Information on Collective Redress** (Para. 10-12, 35-37)

If the trader signs a written commitment acknowledging his or her fault in the determined infringement, the commitment is published in the web site of the Centre as well as in official gazette.

Web page of the Consumer Rights Protection Centre – decisions in administrative cases and the data base of written commitments ([www.ptac.gov.lv](http://www.ptac.gov.lv)).

## **Funding** (Para. 14-16)

The Consumer Rights Protection Centre shall finance (from state budget) any collective redress activities.

## **Problems/Incompatibilities with Recommendation principles**

The law does not regulate funding.

## **Cross Border Cases** (Para. 17-18)

There are no special rules regarding cross-border collective redress and no cases reported.

## **Expedient procedures for injunctive orders** (Para. 19)

If the Consumer Rights Protection Centre has a reason to believe that a violation of consumer rights has been or may be committed and it may cause immediate and significant harm to the economic interests of the particular consumer group, it is entitled to take interim measures.

## **Efficient enforcement of injunctive orders** (Para. 20)

The trader shall inform the Centre on implementation of the specified activities done according to the decision rendered by the Centre and in case such information is not received by the Centre or the trader has not implemented the activities, Centre applies administrative penalty.

**Opt In/Opt Out** (Para. 21-24)

Not applicable in the absence of a horizontal collective redress mechanism.

Regarding the out-of-court consumer mechanism: if the trader signs a written acknowledgment of committed violation and provides for reimbursement of the losses caused to the consumer, the consumers must submit a request for payment, thus it implicitly follows an opt-in mechanism.

**Collective ADR and Settlements** (Para. 25-28)

There are no specific rules of the absence of a horizontal collective redress mechanism.

**Costs** (Para. 13)

In the injunction procedure conducted by the Consumer Rights Protection Centre, the trader bears its legal costs.

**Lawyers' Fees** (Para. 29-30)

There are no specific rules about funding, an agreement between lawyer and client can include contingency fees.

**Prohibition of punitive damages** (Para. 31)

Latvian law does not provide for punitive damages.

**Collective Follow- on actions** (Para 33-34)

There are no specific rules of the absence of a horizontal collective redress mechanism.

**Interplay between injunctions and compensation across all sectors**

No specific rules of the absence of a horizontal collective redress mechanism.

# LATVIA – REPORT

## I. Sectoral Collective Redress Mechanism

### 1. Scope

In answering to the European Commission's public consultation "Towards a Coherent European Approach to Collective Redress"<sup>487</sup> Latvia explicitly stated that taking into consideration the economic situation and courts' capacity, the country expresses doubts regarding the EU initiative on introduction of the collective redress in the courts because it will require fundamental changes in the civil procedure thus Latvia favours the use of out-of-court mechanisms in resolving the disputes.<sup>488</sup>

There has been no major change in Latvia's opinion since 2011 and this is also reflected in the current legislation. Namely, there is no judicial collective redress introduced but ordinary civil procedure rules do not fit for the collective proceedings thus also in practice no compensatory relief is sought *via* courts.

Supervision of the collective interests of the consumers is performed by the Consumer Rights Protection Centre, state institution. Supervision of the collective interests of consumers is included in the following legal acts: 1) Consumer Rights Protection Law providing for the supervision of the contracts between traders and consumers and for the requirements to inform the consumers;<sup>489</sup> 2) Unfair Commercial Practice Prohibition Law,<sup>490</sup> 3) Advertising Law<sup>491</sup> and indirectly 4) Law on the Safety of Goods and

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<sup>487</sup> Commission Staff Working Document. Public Consultation: Towards a Coherent European Approach to Collective Redress. European Commission, SEC(2011) 173 final, 4.02.2011. Available:

[http://ec.europa.eu/justice/news/consulting\\_public/0054/ConsultationpaperCollectiveredress4February2011.pdf](http://ec.europa.eu/justice/news/consulting_public/0054/ConsultationpaperCollectiveredress4February2011.pdf).

<sup>488</sup> Latvijas viedoklis attiecībā uz Eiropas Komisijas paziņojumu "Ceļā uz visa Eiropas Savienībā vienotu pieeju kolektīvo prasījumu jautājumos" [Latvia's opinion regarding the European Commission's public consultation "Towards a Coherent European Approach to Collective Redress"], p. 2, 4. Available in Latvian: [http://ec.europa.eu/competition/consultations/2011\\_collective\\_redress/latvian\\_authorities\\_lv.pdf](http://ec.europa.eu/competition/consultations/2011_collective_redress/latvian_authorities_lv.pdf).

<sup>489</sup> Patērētāju tiesību aizsardzības likums [Consumer Rights Protection Law]. Latvian Law adopted 18 March 1999. Available in English at [http://vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Consumer\\_Rights\\_Protection\\_Law.pdf](http://vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Consumer_Rights_Protection_Law.pdf).

<sup>490</sup> Negodīgas komercprakses aizlieguma likums [Unfair Commercial Practice Prohibition Law]. Latvian Law adopted 22 November 2007. Available in English at [http://vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Unfair\\_Commercial\\_Practice\\_Prohibition\\_Law.doc](http://vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Unfair_Commercial_Practice_Prohibition_Law.doc).

<sup>491</sup> Reklāmas likums [Advertising Law]. Latvian Law adopted 20 December 1999. Available in English: [http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Advertising\\_Law.pdf](http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Advertising_Law.pdf).



Services.<sup>492</sup> Also 5) Law on Extrajudicial Recovery of Debt provides for the competence of the Centre to supervise this licensed area of market.<sup>493</sup>

Use of ordinary civil procedure in the court for collective redress. The Consumer Rights Protection Law provides that if the dispute cannot be resolved between the consumer and the trader, the consumer has the right to settle the dispute in offered out-of-court proceedings or in the court (Article 26<sup>1</sup>(4)). Moreover, it also explicitly states that claims of consumers for compensations for losses and recovery of penalty shall be settled in the court in accordance with the Civil Procedure Law, taking into account that the consumer does not have specific knowledge regarding the characteristics and description of the goods purchased or the services provided (Article 32).

The Unfair Commercial Practice Prohibition Law states that a person who has suffered damage as a result of unfair commercial practices is entitled to bring a claim to a court in accordance with general rules of civil procedure (Article 4<sup>1</sup>). Thus in this part of the research we examined the hypothetical case scenario if the group of consumer intends to use the ordinary civil procedure to submit the collective redress. Hypothetically, there can be made collective redress in the court in accordance with the ordinary civil procedure rules but it would be rather complicated and expensive.

It is suggested that if theoretically Article 88 of the Civil Procedure Law allows the public opt-in redress then neither legislation, nor the case law or legal literature do not support it.<sup>494</sup> Namely, Article 88(1) of the Civil Procedure Law provides that in cases provided for in law, international agreements binding on the Republic of Latvia or legal acts of the European Union, state or local government institutions and persons may submit an application to the court in order to protect the rights and lawful interests of other persons. Supposedly, it could also be entity as referred in the part III(4) of the Commission's Recommendations. However, there is opinion that the part of this Article refers to "an application", not "a statement of claim",<sup>495</sup> but in our view this norm cannot be interpreted so narrowly. I.e., Article 76(1) of the Civil Procedure Law provides that a person in whose interests a case has been initiated pursuant to the application of a public prosecutor, or of a State or local government institution or person to whom has been conferred the right to defend rights and interests protected by law, of other persons in court, shall participate in the case as a plaintiff. Namely, the Article 25(6) of the Consumer Rights Protection Law allows for the Consumer Rights Protection Centre to bring statement of claims when defending consumer rights and lawful interests. In this case the Centre shall not pay court fee (Article 43(5) of the Civil Procedure Law).

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<sup>492</sup> Preču un pakalpojumu drošuma likums [Law on the Safety of Goods and Services]. Latvian Law adopted 07 April 2004. Available in English: [http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Law\\_on\\_the\\_Safety\\_of\\_Goods\\_and\\_Services.pdf](http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Law_on_the_Safety_of_Goods_and_Services.pdf).

<sup>493</sup> Parādu ārpus tiesas atgūšanas likums [Law On Extrajudicial Recovery of Debt]. Latvian Law adopted 08 November 2012 Available in English at [http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Law\\_On\\_Extrajudicial\\_Recovery\\_of\\_Debt.doc](http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Law_On_Extrajudicial_Recovery_of_Debt.doc).

<sup>494</sup> Paupe E. Kolektīvās prasības un to problemātika Eiropas tiesību sistēmā: starptautisko privāttiesību aspekti [Collective Actions and Problematic Issues in European Law System: Aspects of Private International Law]. University of Latvia, Faculty of Law, Master Thesis, 2013, p. 62.

<sup>495</sup> Civilprocesa likuma komentāri. I daļa (1.-28. nodaļa) [Commentaries of the Civil Procedure Law. Part I (chapters 1-28)]. Ed. Prof. Torgāns K., TNA, 2012, p. 246.

In contrast, even though the non-governmental associations for the consumer rights protection have the rights *inter alia* to submit statements of claim to a court regarding the protection of consumers' rights and interests, and to represent the interest of consumers in court (Article 23 of the Consumer Rights Protection Law); the associations will not be exempted from the court fees. Moreover, there are only few consumer associations in Latvia and it is questionable whether those entities would have capacity in terms of financial resources, human resources, and legal expertise, to represent multiple claimants acting in their best interest as suggested by the part III(4) of the Recommendation of the Commission.

Albeit the Centre or associations would like to risk and submit the collective redress in accordance with the ordinary procedure, there would be further procedural obstacles. For instance by submitting the statement of claim in the court, the claimants shall be identified (Article 128 of the Civil Procedure Law) thus the statement of claim without the particular and identified claimant would not be admissible. The law also does not prescribe further collective procedure, e.g., how opt-in would work and what happens if one of the collective redress party does not want to appeal the judgment or want opt-out from the proceedings.

Although the Recommendation does not contain any requirement for groups of claimants which would wish to bring collective proceedings, still, in Latvia, there are also procedural obstacles precluding group of consumers to defend jointly their rights in the court. The Civil Procedure Law allows co-claimants in the case;<sup>496</sup> however, it is not designed for the collective redress.

Moreover, there are the same court fees for the group of consumers as for other litigants in civil procedure. There are no separate fees for the consumer collective claims, i.e., the consumers, consumer groups or associations have no special or reduced state fees in the court. Overall, the system of costs prevents the consumers, consumer groups and association to litigate the consumer matters as the litigation can be costly and time consuming.

Obviously, as the ordinary civil procedure is not favourable either for individual or for the collective redress, there are no cases reported when both Centre and any association would have tried to submit the collective redress in accordance with the ordinary civil procedure.

#### **a. Sectoral**

Article 25 of the Consumer Rights Protection Law provides for the general rules of the injunction proceedings in case the Consumer Rights Protection Centre determines a violation of the consumer rights which affects group consumer interests. This law is the umbrella law for the protection of consumers and their collective interests in cases of agreements between the traders and consumers.

Special rules, also concerning injunctive and compensatory relief, are included in the Unfair Commercial Practice Prohibition Law. I.e., Article 15 of the Unfair Commercial Practice Prohibition Law states that the Consumer Rights Protection Centre shall supervise commercial practices, assessing the impact of the potential violation on the collective interests of consumers, as well as ensuring balanced supervision of activities of persons implementing commercial practices. Also Advertising Law contains both injunctive and compensatory relief provisions (Article 15). Law On Extrajudicial Recovery of

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<sup>496</sup> See: Article 75 and 134(2) of the Civil Procedure Law

Debt also provides for the competence of the Centre to adopt the decision in the case when the non-compliance with this law has caused or could cause harm to the interests of consumer groups. The law further refers to the Consumer Rights Protection Law and the Unfair Commercial Practice Prohibition Law.

Competition Law does not provide for any special collective redress, except that if the person has suffered the damages due to violation of the completion law, she/he shall have the right to claim damages and legal interests (Article 21).<sup>497</sup> No further explanations whether this concerns individual or group claims.

#### **b. Injunctive or compensatory or both**

Injunctive procedure is provided in the Consumer Rights Protection Law, the Unfair Commercial Practice Prohibition Law, the Advertising Law and Law On Extrajudicial Recovery of Debt. Compensatory redress explicitly is provided in the Unfair Commercial Practice Prohibition Law and the Advertising Law; however, as explained below, it is only available if upon proposal of the Consumer Rights Protection Centre the trader acknowledges in writing the violation of consumer rights affecting group interests and the trader undertakes to compensate the damages to the consumers.

Hereby, we give short overview on application of both reliefs.

Injunctive redress. Latvia implemented Directive No. 2009/22/EC and the new rules, as Directive, do not enable those who claim to have suffered detriment as a result of an illicit practice to obtain compensation. Therefore, according to Article 25(8) of the Consumer Rights Protection Law if a violation of the consumer rights has been determined, which affects group consumer interests (collective interests of consumers) and it may cause losses or harm to consumers, as well as to a particular consumer, the Consumer Rights Protection Centre, having evaluated the nature and essence of the violation, as well as other aspects, is entitled to carry out one or several following activities: 1) to propose that the manufacturer, trader or service provider makes a commitment in writing to rectify the violation within the specified time period (this can include the compensatory relief); 2) to take a decision, by which the manufacturer, trader or service provider is required to cease the violation, and to perform specific activities in order to rectify the impact thereof and which determine the time period for the implementation of such activities; 3) to publish the decision taken either fully or partially on the home page of the Consumer Rights Protection Centre and in the official Gazette of the Government of Latvia (the costs associated with the publication shall be covered by the manufacturer, trader or service provider).

The Consumer Rights Protection Centre shall perform the explained activities upon 1) its own initiative, 2) on the basis of a submission of the Association for Consumer Rights Protection, 3) on the basis of the information provided by such institution within the competence of which is the supervision and control of the relevant sector and on the basis of a submission of such institution of the European Union Member State which is included in the list referred to in Article 4(3) of Directive 2009/22/EC of the European Parliament

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<sup>497</sup> Konkurences likums [Competition Law]. Latvian Law adopted in 4 October 2001. Available in English at <http://vvc.gov.lv/image/catalog/dokumenti/Competition%20Law.docx>.

and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Article 25(8<sup>1</sup>) of the Consumer Rights Protection Law).

Basically, the Centre has an exclusive right to initiate injunctive relief. Even more, the Consumer Rights Protection Law provides that if the person submits the claim to the Centre regarding unfair contract provisions or the infringement of other laws, the Centre evaluates whether this infringement has caused or could have caused significant harm to collective interests of consumers. If there is no infringement in the opinion of the Centre, the administrative matter is not initiated (Article 25(8<sup>4</sup>)). Thus application of injunctive redress solely depends on Centre's capacity, financial resources, priorities and competence.

Also the Unfair Commercial Practices Prohibition Law provides for the injunctive relief. The provisions are very similar to those of the Consumer Rights Protection Law. However, this Law does not provide that the Centre can initiate cases upon request on the Consumer Rights Protection Association. The Unfair Commercial Practices Prohibition Law also lists decisions that can be taken by Centre, including the decision to terminate the unfair commercial practice and/or to apply administrative sanctions (Article 15(8)). In addition if for the longer period of time the trader does not 1) submit requested information, 2) terminate the unfair commercial practice and there is impact on the interests of the consumer group, the Centre has the right to suspend the business of the trader (Article 17). Initially, the trader is informed about the Centre's intent to terminate the business and if the unfair commercial practice is continued then within 3 days after taking the decision the Centre affixes a seal at the place of business of the trader.

Pursuant to the Advertising law if the advertising does not conform to the requirements of laws and regulations, the supervisory institution is entitled either to propose the written commitment or takes the decision in the case (Article 15) - the Consumer Rights Protection Centre as supervisory authority can take the decision by which dissemination of the advertising is prohibited or to impose a fine.

Law on Extrajudicial Recovery of Debts states that if the Consumer Rights Protection Centre establishes that the non-compliance with this Law has caused or could cause harm to the interests of consumer groups (collective interests of consumers), it is entitled to take a decision, by which it assigns the creditor or provider of debt recovery services to terminate the violation of this Law or to rectify the violation allowed and determine the deadline for the performance of the necessary activities (Article 4(3)). The procedures by which the Consumer Rights Protection Centre shall take decisions and the procedures for appealing these decisions shall be determined by the Law On the Protection of Consumer Rights and the Unfair Commercial Practice Prohibition Law (Article 4(3)).

None of the laws provide for the competence of the Centre, to decide on payment of the damages to consumers in case one of the decisions is taken.

Compensatory redress is directly associated with injunctive redress. Namely, if the trader agrees to sign the written acknowledgment admitting its guilt in the determined infringement, then also the trader can undertake to compensate the damages to the consumers. This is explicitly provided both in the Unfair Commercial Practices Prohibition Law and the Advertisement Law. Article 15.<sup>1</sup> of the Unfair Commercial Practices Prohibition Law states that the written commitment may include the commitment of the performer of

commercial activities not to perform specific activities and/or to reimburse the losses cause to consumers. Article 15(3<sup>2</sup>) of the Advertising Law states practically the same. The Consumer Rights Protection Centre indicates that not in all administrative cases the Centre proposes the trader to voluntarily acknowledge the violation of the consumers' group interests; it is the right, not the obligation of the Centre.<sup>498</sup> The Centre takes into account the relevant facts of the case and then decides what remedy to use.

The problematic aspect is in the fact that the written commitment is only most effective legal ground for the consumers to protect their interests and claim compensation. Still, the consumers have a little impact on this process as the Centre decides whether to propose the trader to sign the written commitment or not.

This shortcoming is very well illustrated by the recent cases. The Consumer Rights Protection Centre initiated 12 cases against non-bank creditors about the calculation of the total sum of the credits. The non-bank creditors and their association had a long history of discussion regarding this calculation and both sides had a different view. However, the Centre used its powers in accordance with the Consumer Rights Protection Law and the Unfair Commercial Practice Prohibition Law and initially proposed the non-bank creditors to sign the written commitment; however, eight creditors refused voluntarily acknowledge the violation thus the Centre proceeded with administrative case on unfair commercial practice in the consumers' collective interest violations and made decisions against each particular non-bank creditor.<sup>499</sup> Some of the non-bank creditors have appealed the decisions in the court (still pending) arguing that the Centre penalized the companies for not signing the written commitment. It was also claimed that by signing the written commitment and acknowledging the violation, the traders lose their rights to submit the case for adjudication in the court.

Also important fact is that the Centre in its decisions imposed significant penalties, in total approximately 211'000 EUR. Total damages to the consumers were approximately amounting 5,23 millions.<sup>500</sup> For example, in one case the Centre decided that because the company has concluded the crediting agreements that are not corresponding to the law, the damages to the consumers are approximately 2'430'268,68 EUR thus in accordance with Article 15<sup>2</sup> the Unfair Commercial Practice Prohibition Law the Centre may impose fine up to 10% from the last financial year's net turnover but not more than 100'000 EUR thus the penalty in particular case was set in amount of 80'000 EUR.<sup>501</sup> The penalty shall be paid to the state budget. In these cases the consumers are not receiving the overpaid monies. Of course, they can use unfavourable civil procedure to claim the compensations.

In contrary, in four other cases the non-bank creditors have signed the written commitments acknowledging the violation and undertaking to change

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<sup>498</sup> The Consumer Rights Protection Centres decision in consumers' collective violation case No. 8-pk, 21 February 2017, para 4.1.

<sup>499</sup> The Consumer Rights Protection Centres decision in consumers' collective violation case No. 8-pk, 21 February 2017; The Consumer Rights Protection Centres decision in consumers' collective violation case No. 11-pk, 21 February 2017 etc.

<sup>500</sup> Ātro kredītu kompānijām ir jāatlīdzina zaudējumi [Fast credit companies shall pay damages] 1 March 2017 at [http://www.pateretajs.lv/index.php?option=com\\_content&view=article&id=134%3Aatro-kredtu-kompnijm-ir-jatldzina-zaudjumi&lang=lv](http://www.pateretajs.lv/index.php?option=com_content&view=article&id=134%3Aatro-kredtu-kompnijm-ir-jatldzina-zaudjumi&lang=lv).

<sup>501</sup> The Consumer Rights Protection Centres decision in consumers' collective violation case No. 10-pk, 21 February 2017.

the commercial practice as well as upon application of the consumers to compensate the overpaid monies.<sup>502</sup> In the written commitments the traders also undertake to place all relevant information regarding the compensations at the consumers' reception centres. Interesting that there is no undertaking to place this information at web-site of the trader or sent it to the consumers directly. It is questionable how many consumers would ever know about their rights to get the compensation and clearly those traders signing the written commitments have escaped from the penalties.

Bearing in mind these cases, one can conclude that for some of the traders the payment of penalty is more favourable, less expensive and less problematic; however, one of the main purposes of the Recommendation is to enable injured parties to obtain compensation but in Latvia the payment of the compensation much depends on cooperation between trader and the Centre. Moreover, it is very important to indicate that appeal of the decision in the Administrative Court does not suspend fulfilment of the Centre's decision, except as concerns the penalty. The trader shall stop the unfair commercial practice but the payment of the penalty is "frozen" until the dispute is resolved by the court. The dispute resolution of the court may take years thus it is doubtful whether that is effective system and that the consumers benefit from such procedure.

## **2. Procedural Framework**

### **a. Competent Court**

As explained above there is no special mechanism for the collective redress in the civil procedure law, the action can be submitted in accordance with the ordinary civil procedure in the first instance court having the jurisdiction.<sup>503</sup> For example, Article 18<sup>1</sup> of the Advertisement Law explicitly provides that person who has been caused harm by advertising is entitled to bring a claim to a court in accordance with the procedures laid down in law.

The Consumer Rights Protection Centre has competence to grant the injunction and set the penalty in cases where a violation of the consumer rights affects group consumer interests (collective interests of consumers). The decisions of the Centre are appealable in the Administrative court.

The Centre shall propose the trader to sign the written commitment acknowledging the violation of consumer group interests whereby the trader also can undertake to pay damages to the consumers. This is voluntarily act of the trader.

### **b. Standing**

### **c. Availability of Cross Border collective redress**

There are no special rules regarding cross-border collective redress and no cases reported.

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<sup>502</sup> See: Written commitment No. 4/10 by SIA "E-LATS" dated 27 October 2016.

<sup>503</sup> Civilprocesa likums [Civil Procedure Law], Article 23. Latvian Law adopted 14 October 1998. Available in English at [http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Civil\\_Procedure\\_Law.pdf](http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Civil_Procedure_Law.pdf)

#### **d. Opt In/ Opt Out**

##### **Principal availability of either/or/both options? /Conditions for either type (prescribed by law or discretion of the judge?)**

Laws are not explicit as concerns opt-in or opt-out mechanisms; however, in accordance with the practice if the trader signs the written acknowledgment of committed violation and it also provides for reimbursement of the losses caused to the consumer, the trader shall invite the consumers to submit the requests for payment of the compensation thus it implicitly provides for opt-in mechanism.<sup>504</sup> How effectively it works in practice, it is questionable.

##### **Opt-out restricted to in-jurisdiction claimants?**

N/A

##### **If opt-out, is it justified by the sound administration of justice?**

N/A

##### **Specific measures related to the fact that affected persons are not identifiable**

Currently, the Law does not prescribe order how to identify the affected persons but according to the written acknowledgments, it can be concluded that either the traders themselves shall identify and contact the affected consumers or they are publishing or placing the information regarding the compensation and then the consumers shall be active by requesting compensation.

#### **e. Main procedural rules**

##### **Admissibility and certification criteria**

As there is no procedure for collective redress in the courts, we would like briefly explain, how, the Consumer Rights Protection Centre decides on admissibility and initiation of the cases.

The Consumer Rights Protection Centre supervises the market and ensures the effective protection of consumer rights and interests. In examining a person's submission regarding infringements of consumer rights, which apply to or could be applied to collective interests of consumers, the Centre shall perform supervision measures in order of priority, taking into consideration 1) the supervision priorities specified in the working plan for the current year; 2) the utmost efficient use of financial resources granted for the institution; 3) the number of submissions received regarding a particular trader and violation; 4) the possible harm or harm committed to the collective interests of consumers; 5) the nature and duration of the violation; 6) the particular market sector. For example, in 2017 the Centre's priorities in supervising the collective interests of the consumers are the evaluation of the creditworthiness of the consumers in out-of-bank crediting, agreements regarding the use of sports' clubs, out-of-court debt collectors' services etc.<sup>505</sup>

As indicated the Centre plays the central and exclusive role in collective redress in Latvia thus the consumers' collective rights much depend on the

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<sup>504</sup> Written acknowledgment by SIA "IPF Digital" dated 27.03.2017. Available in Latvian at [http://www.ptac.gov.lv/sites/default/files/izraksts\\_rakstveida\\_apnemsanas.pdf](http://www.ptac.gov.lv/sites/default/files/izraksts_rakstveida_apnemsanas.pdf).

<sup>505</sup> See: in Latvian on the priorities: <http://www.ptac.gov.lv/lv/content/ptac-prioritates>.

capacity, financial resources, priorities and competence of the Centre. We are convinced that the Centre is very competent; however, there are doubts whether the Centre can detect all violations.

This particular example demonstrates that the traders can perform unfair commercial practices for longer period of time and the Centre either is not informed about such practice or is not in capacity to detect the violation in timely manner. Namely, the municipal waste management company overcalculated the charge for its services starting from 1 August 2014 until 30 September 2016, thus in the written commitment the company undertook to repay back the difference – the monies overcharged. However, the company indicated that the sums will be paid to the balance of each apartment house because repayment to the particular client may be impossible as many owners or tenants have changed during this period.<sup>506</sup> This example also indicates that not always the particular person that suffered harm will be compensated.

### **Single or Multi-stage process**

If the trader signs a written commitment, the trader has acknowledged his or her fault in the determined infringement. That can be considered as single stage process as it cannot be challenged or appealed. The commitment is published in the web site of the Centre as well as in official gazette.

If the commitment is not fulfilled, the Centre shall take a decision. Also decision can be taken if the trader refuses to sign the written commitment or Centre considers that the violations are too significant. Centre's decisions can be appealed in the Administrative court. Thus this is multi stage process.

### **Case-management and deadlines**

The "umbrella" law – the Consumers Rights Protection Law does not explicitly provide for the specific deadlines. However, the Unfair Commercial Practice Prohibition Law states that the supervisory authority shall take the decision on the unfair commercial practice within 6 months from the day of its initiation, but, if due to objective circumstances the case cannot be reviewed, this term can be prolonged but not more than for one year (Article 15(12)).

The same law also states that the written commitment shall be deemed received (enter into effect) from the moment when the Supervisory Authority has approved its acceptance, certifying in writing to the performer of commercial activities that the relevant measures are sufficient for elimination of the violation and its impact. The time period for elimination of the violation shall not exceed the time period necessary for the performer of commercial practices to take the intended measures and to ensure the conformity with the interests of consumers, and usually may not be longer than three months, except cases when the nature of the intended measures justifies a longer time period (Article 15<sup>1</sup>(2)). The same clause is included in Article 15(10) of the Advertisement Law.

As the procedure in the state institution, i.e., the Consumer Rights Protection Centre, is administrative procedure then also general rules may apply. For example, according to the Administrative Procedure Law<sup>507</sup> if an

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<sup>506</sup> Written acknowledgment No. 177 by SIA "Āne EP" dated 17 October 2016. Available in Latvian at [http://www.ptac.gov.lv/sites/default/files/apnemsanas\\_ane\\_ep.pdf](http://www.ptac.gov.lv/sites/default/files/apnemsanas_ane_ep.pdf).

<sup>507</sup> Administratīvā procesa likums [Administrative Procedure Law]. Latvian law adopted 25.10.2001. Available in English:



administrative matter is initiated on the basis of a submission, an institution shall take a decision regarding the issue of an administrative act or termination of the matter within a month from the day the submission is submitted but if due to objective reasons it is not possible to comply with the one month time period, the institution may extend it for a period not exceeding four months from the day the submission is submitted (Article 64).

### **Expediency (particularly in injunctive cases)**

*See also above.*

According to the reviewed cases due to the complexity, the number of similar cases, time consuming exchange of the information between the Consumer Rights Protection Centre and the traders, six months may not be sufficient time to take the decision in consumers' collective interest violation cases. For example, the Centre initiated the case regarding possible unfair commercial practice on 16 June 2016 but took the decision in 21 February 2017. In between the Centre also proposed to sign the written commitment, set the meetings, asked documents and explanations from the trader and for each action there was established specific time periods. During the process the trader requested to prolong the set terms at least five times. The decision was appealed one month later; however, on the date of writing this report (19 May 2017) the court even has not set the hearing date.<sup>508</sup> During the procedure in the Centre the trader has rectify its commercial practice and it complied with the law; however, from this example we see that from one side the Centre has limited capacity to review the case in expedient way but from other side we also can conclude that the traders try to abuse and prolong the process. Moreover, if the Centre's decision is appealed in the Administrative court, the dispute can continue for 2-5 years.

### **Evidence/discovery rules**

The Unfair Commercial Practice Prohibition Law, Law on Extrajudicial Recovery of Debt and the Advertisement Law contain special rules for the Consumer Rights Protection Centre to request the relevant materials from the traders.

Article 15(1) of the Advertisement Law states that in evaluating the conformity of advertising with the requirements of laws and regulations, the Supervisory Institution is entitled to request and receive any information, documents and other evidence from an advertiser, producer of advertising, disseminator of advertising and other natural and legal persons necessary for clarification of the essence of the matter, as well as oral explanations regarding the veracity, accuracy or conformity with the requirements of laws and regulations of an announcement (assertion) provided in advertising, as well as to determine the time period for submitting the information, documents and evidence and the type of provision of information. If the evidence requested is not submitted within the specified time period or it is submitted incompletely, the Supervisory Institution is entitled to view the announcement (assertion) offered in the advertising as imprecise or inaccurate. Article 14(4) of the Unfair Commercial Protection Law provides very similar rights for the Centre in cases of conformity of commercial

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[http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Administrative\\_Procedure\\_Law.doc](http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Administrative_Procedure_Law.doc).

<sup>508</sup> The Consumer Rights Protection Centres decision in consumers' collective violation case No. 10-pk, 21 February 2017.

practice. Also there is following presumption: if the performer of commercial practices does not provide the requested information or if it is incomplete, the Supervisory Authority is entitled to consider that the information used in the commercial practices is imprecise or false (Article 14(3) of the Consumer Rights Protection Law).

Moreover, the officials of the Consumer Rights Protection Centre, in performing market and consumer rights supervision, are entitled at any time (also without prior notification) to arrive at the manufacturer, trader or service provider (Article 25(6<sup>1</sup>)).

Also the general rules of administrative process can apply. In acquiring information, an institution may use all legal methods, and obtain information from participants in the administrative proceeding and from other authorities, as well as by means of the assistance of witnesses, experts, inspections, documents or other type of evidence. If the information needed by an institution is not at the disposal of participants in the administrative proceeding but is at the disposal of another authority, the institution shall acquire the information itself rather than requiring it from participants in the administrative proceeding (Article 59(2) Administrative Procedure Law). The participants of the procedure have obligation to submit evidences that are at disposal of such party as well as inform about the facts known to them and that can be of importance in the case at hand (Article 59(4) Administrative Procedure Law).

In one consumers' collective interest violation case the Centre concluded that trader has performed unfair commercial practice by providing fictitious information in food supplements' advertisements and requested from the trader written evidence where, when and in what amount the advertisements were showed pursuant to Article 15(2) of the Unfair Commercial Practice prohibition Law. The Centre also reminded the trader that in accordance with the Article 59(1), 61 and 62(1) of the Administrative Procedure Law, the trader has the right to express its opinion and arguments in administrative procedure. However, in this case at hand the trader replied that the advertisements are corrected and attached the corrected ads. As the trader did not provided the Centre with requested information the Centre itself acquired information regarding placed advertisements. Taking into consideration the fact that information was not provided and other circumstances of the case the Centre decided that the violation was fundamental and prohibited the trader to perform the unfair commercial practice as well as imposed the penalty to be paid in the state budget.<sup>509</sup> This case illustrates that the traders are not always cooperative and the Centre shall use its resources to collect information and evidences.

### **Interim measures**

If the Consumer Rights Protection Centre has a reason to believe that a violation of consumer rights has been or may be committed and it may cause immediate and significant harm to the economic interests of the particular consumer group, it is entitled to take as interim measure one or several decisions, by which: 1) an obligation to terminate the violation immediately is imposed upon the manufacturer, trader or service provider; 2) prohibits the action of the manufacturer, trader or service provider, which may cause the violation, if it has not been committed yet but is likely to be committed. The

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<sup>509</sup> The Consumer Rights Protection Centres decision in consumers' collective violation case No. 12-pk, 29 February 2016.

decision regarding interim measure shall be valid from the time of notification thereof until the time when it is cancelled or amended by the decision of the Consumer Rights Protection Centre or when the final decision of the Consumer Rights Protection Centre comes into effect. The decision of the Consumer Rights Protection Centre regarding the interim measure may be appealed by the manufacturer, trader or service provider, in respect of which the interim measure has been issued, to a district administrative court within 10 days after the day of entering into effect thereof. The appeal of the decision shall not suspend the operation. The court shall adjudicate by written procedure the application regarding the decision of the Consumer Rights Protection Centre regarding the interim measure within 14 days. The decision of the court cannot be appealed and shall come into effect upon the adoption (Article 25.<sup>1</sup> of the Consumer Rights Protection Law).

Also Article 18 of the Unfair Commercial Practice Prohibition Law provides for the interim measure if the violation may cause immediate and significant harm to the economic interests of the particular consumer group, i.e., the Centre can take to immediate decisions: 1) the performer of commercial practices has to fulfil the duty to terminate the unfair commercial practice or 2) the unfair commercial practice is prohibited, if it has not been commenced yet, but is expected. The decision on interim measures are in force from the moment of its announcement and is in force until the centre's decision is annulled, changed or the final decision enters into force.

Article 17<sup>1</sup>(1) of the Advertisement Law provides for the similar "temporary regulations" in form of the decisions by which 1) the advertiser is instructed to provide through advertising or goods labelling, or in another manner, additional information that is essential from the point of view of protection of persons or the performer of economic activities, or the lawful rights of the performer of professional activities; 2) articular elements (information, visual representations, audio or other special effects) are requested to be deleted from the advertising; 3) dissemination of the advertising is prohibited. Such decision can be appealed within 10 days in the Administrative Court but it does not suspend the operation of the decision.

In one recent case the Centre took the decision "temporary regulation" terminating the unfair commercial practice pursuant *inter alia* Article 4(3) of the Law on Extrajudicial Recovery of Debt. Namely, the Centre both on its own initiative and upon the applications of 35 consumers determined that the out-of-court debt collector has started the debt collection from consumers by sending them notices on payable debts. However, the notices were not in accordance with the Law on Extrajudicial Recovery of Debt because they lack relevant information. Thus the Centre decided that the trader has performed commercial practice that does not conform to professional diligence and that fundamentally influences consumers' economical behaviour. The Centre also indicated that the consumer can reasonably expect that the company as professional participant of the market, that has received the special licence for out-of-court debt collection, would guarantee provision of truthful and full information.<sup>510</sup> Moreover, the trader with its activities created notion to the consumers that the best for them is to pay the requested debt than try to solve the dispute in the court as in the latter case most probably the consumers will lose the trial. By giving such notices the trader already collected 23'272,60 EUR from 216 consumers but still the collection was on-going therefore the Centre took the decision with which the performer of

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<sup>510</sup> Out-of-debt collection is licensed sphere of business in Latvia.

commercial practice had to fulfil the duty to terminate the unfair commercial practice (Article 15(8) of the Unfair Commercial Practice Prohibition Law) thus protecting legal and economic rights of the consumers.<sup>511</sup> There is no yet information whether the decision is appealed in the Administrative Court. If indeed the collection of the debts was unlawful, only remedy for the consumers to get the money back is to use inefficient ordinary civil procedure law mechanism as the trader is not signing the written commitment undertaking to compensate the consumers. If we presume that the average paid sum of each of 216 consumers is around 107,- EUR the state fee to initiate individual claim in the court would cost 71,14 EUR (Article 34 of the Civil Procedure Law). If all 216 claims are consolidated then the state fee for litigation would be approximately 1'036,37 EUR plus all other costs.

It shall be added that if the licensed out-of-court debt collector does not provide the relevant information to the Centre, the Centre has right to terminate the license up to 6 months.

### **Court directed settlement option during procedure**

General rules apply if the judicial collective redress is reviewed in accordance with ordinary civil procedure law. The court shall strive to reconcile the parties during the court procedure (Article 151(3) of Civil Procedure Law); however, the settlement shall be entered by the parties and shall be submitted to the court for approval (Article 227(1) of Civil Procedure Law).

### **In case of out of court settlements: judicial control**

According to the general rules, public person, for example, Consumer Rights Protection Centre and private company can conclude administrative contracts in order to terminate a legal dispute or if the legal norms that are to be applied grant freedom of action to the institution with respect to the issuance of administrative instruments, their contents or with respect to actual actions.<sup>512</sup> For the institution to conclude such administrative contract the consent of the higher institution is needed (Article 80 and 82 of State Administration Structure Law). If a contracting party does not properly perform the administrative contract or has doubts as to the validity of such contract, the other contracting party may request the performance of the contract by judicial proceedings (Article 85 of State Administration Structure Law). No such cases publicly reported.

## **3. Available Remedies**

### **a. Type of damages**

As mentioned above, both the Advertising Law and the Unfair Commercial Practice Prohibition Law provides that the trader, by signing the written commitment, may be obliged to undertake to reimburse the losses caused to consumers. There are no other explanations or references thus, most likely, the general rules of civil law on damages apply.

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<sup>511</sup> The Consumer Rights Protection Centres decision in consumers' collective violation case No. 3.3.-7/2294/F-24, 04 April 2017.

<sup>512</sup> Valsts pārvaldes iekārtas likums [State Administration Structure Law]. Latvian Law adopted 06 June 2002. Available in English: [http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/State\\_Administration\\_Structure\\_Law.doc](http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/State_Administration_Structure_Law.doc).

According to the Civil Law, a loss shall be understood to mean any deprivation which can be assessed financially (Article 1770) and everyone has a duty to compensate for losses they have caused through their acts or failure to act (Article 1779).<sup>513</sup>

From a few cases where the traders have undertaken to pay compensation to the consumers, it is evident that the traders compensate real and direct damages. Namely, where the violation has been indicated, the traders pay back exact amount of monies that were overpaid by the consumers. For example, in one case the non-bank creditor breached the Unfair Commercial Practice Prohibition Law because in the invoices to consumers with active debts there were included such expenses as "unpaid creditors' damages". Those expenses were higher than it is fixed in the Regulations Regarding the Permissible Amount of Expenses for Recovery of a Debt and the Non-reimbursable Expenses, i.e., the creditor charged more than 17 EUR.<sup>514</sup> Upon the Consumer Rights Protection Centre's initiative the non-bank creditor undertook to repay the consumers amounts paid that were higher than 17,- EUR if the consumers submit relevant applications to the trader within one year. The creditor also promised to inform in writing the consumers to whom this written commitment can be related to. It is also indicated in the written commitment that the trader shall reserve the rights to sue the debtors in the court of general jurisdiction and to collect the damages arising out of debt collection in full.<sup>515</sup> Interesting, that if the written acknowledgment is published in the Centre's webpage, than in the web page of the creditor it is not.

In other case, in the written commitment the trader undertook to pay back to the consumers monies for the unfulfilled services and informed the Consumer Rights Protection Centre about the fulfilment of the commitment.<sup>516</sup> Indeed, Article 15<sup>1</sup>(3) of the Unfair Commercial Practice Prohibition Law provides that the performer of commercial practices shall, without delay but not later than within three working days after the end of the time period set by the Centre, inform the Supervisory Authority regarding fulfilment of the written commitment, adding proof.

For general public, information about the total number of the consumers affected by the unfair commercial practice, the amounts unfairly collected, then paid back to the consumers and about the fulfilment of the written commitments, is not available.

If the trader does not fulfil the written commitment then the Centre can take one of the indicated decisions, including decision on administrative penalty. In that case the consumers are not receiving monies they would be entitled to. In that case general rules apply - a person who has suffered damage as a result of unfair commercial practices is entitled to bring a claim to a court in accordance with the procedures laid down in law (Article 4<sup>1</sup> of Unfair

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<sup>513</sup> Civillikums [Civil Law] Latvian Law adopted 28 January 1937. Available in English: [http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/The\\_Civil\\_Law.doc](http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/The_Civil_Law.doc).

<sup>514</sup> Noteikumi par parāda atgūšanas izdevumu pieļaujamo apmēru un izdevumiem, kuri nav atlīdzināmi [Regulations Regarding the Permissible Amount of Expenses for Recovery of a Debt and the Non-reimbursable Expenses] Regulations of the Cabinet of Ministers No. 61 adopted 29 January 2013. Available in English: [http://www.vvc.gov.lv/export/sites/default/docs/LRTA/MK\\_Noteikumi/Cab\\_Reg\\_No\\_61\\_Regarding\\_the\\_Permissible\\_Amount\\_of\\_Expenses\\_for\\_Recovery.doc](http://www.vvc.gov.lv/export/sites/default/docs/LRTA/MK_Noteikumi/Cab_Reg_No_61_Regarding_the_Permissible_Amount_of_Expenses_for_Recovery.doc).

<sup>515</sup> Written commitment by SIA "IPF Digital Latvia" dated 27 March 2017.

<sup>516</sup> Written commitment No.2 by SIA "Baltic Able Traders" dated 9 November 2016.

Commercial Practice Prohibition Law) what can be rather difficult as explained above.

**b. Availability of punitive or extra-compensatory damages and their conditions**

No special provisions.

**c. Skimming-off/ restitution of profits**

No special provisions.

**d. Possibility to seek an injunction and compensation within one single action**

As explained above, the written commitment of the trader can provide the obligation to pay the damages to the consumers.

**e. Possibility to rely in an injunction in separate follow-on individual or collective damages actions**

No special provisions.

**f. Limitation periods**

Consumers Rights Protections Law provides that a consumer is entitled to submit a claim to the trader or service provider in respect of the non-conformity of goods or service with the provisions of a contract within two years of the day of purchase of the goods or receipt of the services.

However, it is important to note one aspect in this regard. The general limitation period is 10 years as provided by Article 1895 of the Civil Law; however, the Commercial Law<sup>517</sup> as special law provides that the claims arising from a commercial transaction are subjected to a limitation period of three years, unless other limitation period is specified by the law. The problematic feature of these different limitation periods are demonstrated by the following recent case. The trader required a number of consumers to pay the debts for the land lease as from year 2008. Considering that this is unfair commercial practice the Centre took decision on "provisional measures" and terminated the unfair commercial practice.<sup>518</sup> In its webpage the Centre placed information inviting the consumers affected by this unfair commercial practice to check since when the debt has calculated. For example, if the payment for the lease had been calculated from 1 January to 1 September 2008 thus 8 years have passed and because it is considered as commercial transaction then the limitations period most likely is three years as provided by the Commercial law. Moreover, the Centre adds that in case of litigation the consumers are advised to turn the courts' attention that the special limitation period applies.<sup>519</sup>

Firstly, it can be seen that the land lease agreement between a trader and a consumer is considered as commercial transaction in the light of special

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<sup>517</sup> Komerclikums [Commercial Law] Latvian law adopted 13 April 2000. Available in English: [http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/The\\_Commercial\\_Law.doc](http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/The_Commercial_Law.doc).

<sup>518</sup> The Consumer Rights Protection Centres decision in consumers' collective violation case No. 3.3.-7/2294/F-24, 04 April 2017.

<sup>519</sup> See in Latvian <http://www.ptac.gov.lv/lv/news/informacija-pateretajiem-par-sia-vienotais-norekinu-centrs-un-pilsetas-zemes-dienests-darbibu>.

norms regarding limitation periods included in the Commercial Law. Most likely it is so, because the Consumer Rights Protection Law provides only for the limitation period regarding the claims of consumers against traders, not *vice versa*. Secondly, the Centre had a right to stop this unfair commercial practice but it can only inform the consumers, not to offer remedy to pay back the sums illegally received by the trader.

There is special time period set for the Supervisory Authority to initiate the administrative case. Article 15(12) of the Unfair Commercial Practice Prohibition Law states that the Consumer Rights Protection centre shall take the decision on unfair commercial practice within 6 months from the initiation of the case. If due to objective reasons the Centre cannot observe this term, it can be extended but not longer than for 2 years. The same clause can be found in the Article 15(10) of the Advertisement Law.

#### **4. Costs**

There are no costs if the injunction procedure is conducted in the Consumer Rights Protection Centre, i.e., the process in the institution is free; however, it does not guarantee that the procedure is not expensive.<sup>520</sup>

#### **5. Lawyers' Fees**

In the procedure conducted in the Consumer Rights Protection Centre, the trader bears its legal costs.

#### **6. Funding**

The law does not regulate the issue of the funding. So, even if the Consumer Rights Protection Associations want to submit the statements of claim to a court regarding the protection of consumer rights and interests in accordance with Article 23 of the Consumer Rights Protection Law then they do not have either their or other funding available.

In answering to the European Commission's public consultation "Towards a Coherent European Approach to Collective Redress", Latvia indicated that it is too early to discuss about the funding of collective redress but it is suggested that the procedure shall be financed by the organisation designated by the state. Today it means that the Centre shall finance (from state budget) any collective redress activities if it decides so.

However, in opposite, the traders are more organized and active in this regard. Recently there was initiative within the members of the Alternative Financial Services Association of Latvia. Namely, the Consumer Rights Protection Centre took many decisions on unfair commercial practice against non-bank creditor companies and applied penalties in the total amount more than 200'000 EUR. The Association suggested to the members who were penalized by the Centre to appeal the decisions in the court and offered to members united legal assistance in appeal procedure and compensation of the expenses of the hired law office from the budget of Association. In case of the positive court's decision and reduced or suspended penalty, the members

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<sup>520</sup> B. Vītoliņa, Patērētāju tiesību aizsardzības pamati. [Basics of Protection of Consumer Rights]. Rīga, Zvaigzne ABC, 2015, p.91.

shall repay the legal costs of association. The cases are still pending and no further information is publicly available.

## **7. Enforcement of collective actions/settlements**

### **Framework for enforcement**

In case if the trader has agreed to sign the written commitment acknowledging the violation, the specific time period within which it shall be performed is indicated in the commitment (Article 25(8) of the Consumer Rights Protection Law). The Unfair Commercial Practice Prohibition Law is more specific providing that the time period for elimination of the violation shall not exceed the time period necessary for the performer of commercial practices to take the intended measures and to ensure the conformity with the interests of consumers, and usually may not be longer than three months, except cases when the nature of the intended measures justifies a longer time period (Article 15<sup>1</sup>). The same clause is included also in Article 15(3<sup>3</sup>) of the Advertisement Law.

In one recent case the trader undertook to pay damages to the consumers within one year, however, from this written commitment it cannot be seen why the term is one year, not three months.<sup>521</sup> It can be guessed that it is because consumers shall apply themselves to the trader with the requests for compensations. In other case where the trader did not paid back money for non-provided services, the term to pay back to the consumers was set one month.<sup>522</sup>

The Consumers Rights Protection Centre's decision by which the manufacturer, trader or service provider is required to cease the violation, and to perform specific activities in order to rectify the impact thereof and which determine the time period for the implementation of such activities shall be in effect on the day when the addressee becomes aware of it. The imposed penalties shall be paid within one month from the moment when decision is taken (Article 15(3) of the Unfair Commercial Practice Prohibition Law).

The decision can be appealed by the trader but the appeal of the decision shall not suspend the operation thereof, except for the imposed penalties (Article 25(9) of Consumer Rights Protection Law and Article 19 of the Unfair Commercial Practice Prohibition Law).

In practice it is admitted that the penalties imposed to the traders, for example, for unfair commercial practices do not prevent or motivate the trader from the continuation of the unfair practice because in some cases the profits are significantly larger than the administrative penalty.<sup>523</sup>

## **8. Efficient enforcement of compensatory/ injunctive order**

The general rule is set in Article 25(10) of Consumer Rights Protection Law stating that a trader shall inform the Centre on implementation of the

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<sup>521</sup> Written commitment by SIA "IPF Digital Latvia" dated 27 March 2017.

<sup>522</sup> Written commitment No.2 by SIA "Baltic Able Traders" dated 9 November 2016.

<sup>523</sup> B. Vītoliņa, Patērētāju tiesību aizsardzības pamati. [Basics of Protection of Consumer Rights]. Rīga, Zvaigzne ABC, 2015, p.354.



specified activities done according to the decision rendered by the Centre and in case such information is not received by the Centre or the trader has not implemented the activities, Centre applies administrative penalty.

However, as regards the written commitments, the Unfair Commercial Practice Law is more specific providing that the performer of commercial practice shall inform the Centre regarding the performance of the relevant activity immediately but not later than within three working days after the end of time period laid down in the written commitment and shall attach evidences (Article 15(7)). Very similar norm is provided in the Article 15(3<sup>5</sup>) of Advertisement Law. If the written commitment is not fulfilled the Centre can take one or more decisions as provided by all three Laws.

Next case illustrates how non-efficient system can be. On 9 November 2016 the trader by written commitment undertook to pay until 8 December 2016 the amounts received by the consumers for unfulfilled orders.<sup>524</sup> However, as it is evident from the publicly available information, the trader did not fulfil the written commitment and did not submit to the Centre information about fulfilment of it. Moreover, the trader continued unfair commercial practice, i.e., the Centre made a "control" purchase on the website of the trader, paid the price, however, the goods were not received. The Centre also continued to receive the consumer complains (around 139 in total). The trader closed the website and did not respond to the Centre's written requests. The Centre adopted the decision on 24 March 2017 stating that by unfair commercial practice the trader has originated fundamental losses for the consumers therefore the penalty in amount of 20'000 EUR is imposed in order to motivate the company to stop this practice and stop to continue it.<sup>525</sup> By our own investigation we found that the company has been excluded from the tax payers register for unpaid taxes and the court has announced the company insolvent. In this case all activities were not efficient and the consumers are not benefiting. Such trader can ease close one company and open another. This schema does not work so easily in the licensed sectors such as, the out-of-court debt collection or consumer crediting.

## **9. Number and types of cases brought/pending**

There is one written commitment submitted in the Centre in 2017 but 13 – in 2016.<sup>526</sup> In accordance with the official website of the Consumer Rights Protection Centre there were 26 in 2016 and already now 15 cases in 2017 where the decisions regard the collective interests of the consumers were taken.<sup>527</sup>

## **10. Impact of the Recommendation/Problems and Critiques**

### **a. Consequences where no collective redress mechanism is available**

In answer to the European Commission's public consultation "Towards a Coherent European Approach to Collective Redress" Latvia clearly communicated its view that the introduction of the judicial collective redress

<sup>524</sup> Written commitment by SIA "Baltic Able Traders" dated 9 November 2016.

<sup>525</sup> The Consumer Rights Protection Centres decision in consumers' collective violation case No. 14-pk, 24 march 2017.

<sup>526</sup> See in Latvian: <http://www.ptac.gov.lv/lv/table/rakstveida-apnemsanas>.

<sup>527</sup> See in Latvian : <http://www.ptac.gov.lv/lv/table/ptac-l-mumi>.

demand fundamental changes in the civil procedure and it will overload the court system. Firstly, an increase in the workload of the court of general jurisdiction cannot be used to justify the lack of the judicial redress mechanism. Secondly, it is acknowledged that there are fundamental shortages of the dispute resolution *via* the Consumer Rights Protection Centre *inter alia*:

- The procedure is lengthy and non-effective, especially in the cases when the trader is not cooperative. The decision of the Centre is appealable in the Administrative Court thus the final judgment can be received within 2-5 years.<sup>528</sup> Moreover, until the final court's decision the trader is suspended from paying imposed penalty. It is evident from the case law that sometimes the payment of penalty is cheaper for the trader comparing with the damages caused.
- The return of the monies to the consumers, is possible only if the trader signs the written acknowledgment of the violation thus if the trader is not cooperating the consumers are not receiving any compensation. In practice even if the written commitment is signed by the trader usually the consumers can receive the really paid monies for the particular services or goods; however, other kind of damages is not awarded. The Unfair Commercial Practice Prohibition Law explicitly states that a person who suffered damage as a result of unfair commercial practices is entitled to bring a claim to a court but most likely in practice it is expensive, time consuming to bring such claims.

In addition, the written commitment acknowledging violation can be signed only by the request of the Consumer Rights Protection Centre, i.e., the trader cannot do it upon request of consumers or on its own initiative. Therefore the Centre always shall be in control of all spheres of the market and shall have a capacity to supervise the market; however, in reality as it was indicated, the Centre performs its activities by choosing the priorities thus not all violations can and will be detected.

Furthermore, the written commitment is not offered by the Centre to the trader if violation of the consumers' rights is fundamental thus, basically, if the trader by its actions has affected great number of the consumers the Centre will not offer to sign the written commitment and the consumers will not receive compensation. This raises the question whether that is proportional to the interests of the consumers.

Another issue is fulfilment of the written commitments. Indeed, the law provides that if the commitment is not fulfilled the Centre shall take the decision and impose the penalties. The trader can fulfil the commitment formally. For example, in the most reviewed cases the traders themselves indicate and inform the affected consumers, however, there are no publicly available data how effective was informative campaign and how many consumers refers to the traders etc. Also there are cases where the traders are not fulfilling the written commitments and "vanish" from the market thus also not fulfilling the Centre's decision to pay penalties or stop the illegal practice. The trader can easily manipulate with this system.

European Consumer Centre Latvia has expressly provided that there is an increasing need for special consumer protection in the light of new forms of aggressive advertising, unfair practices etc. and the collective redress would

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<sup>528</sup> B. Vītoliņa, *Patērētāju tiesību aizsardzības pamati*. [Basics of Protection of Consumer Rights]. Rīga, Zvaigzne ABC, 2015, p. 92.

enhance the protection of consumers' rights. They also state that the existing ADR mechanisms are often ineffective and there is need to introduce the appropriate mechanism of compensatory redress so that the amount of the individual damages would not anymore be significant.<sup>529</sup> In our view, the lack of judicial collective redress and semi-efficient compensatory system does not facilitate access to justice for consumers.

#### **b. Impact of the collective mechanism (or lack of) on behaviour/ policy of stakeholders**

There is no big discussion regarding the collective redress in Latvia but definitely, lack of the judicial collective mechanisms is used by the traders as in many cases they do not sign the written commitment because they disagree with the decision of the Consumers Rights Protection Centre thus there is no compensations paid to the consumers. In case the Centre takes the administrative decision, the penalties are paid to the state budget. Moreover, in many cases the Centre's decisions are appealed in the Administrative Court thus prolonging the review of the case and the traders are suspended to pay the penalties until the court takes a final decision.

In general, consumers are not so much informed about their rights, for example, the survey indicated that 53% of the stakeholders are weakly informed about their consumer rights and 59% are pessimistic about reaching acceptable solution in the dispute with the trader.<sup>530</sup> Thus one can conclude that if the consumers are not informed about their basic consumer rights, most likely they will not be active in protecting their rights collectively.

In addition, it shall be mentioned that in case of a fundamental violation of the consumer rights which affects group consumer interests and may cause losses or harm to consumers, the Centre shall adopt the administrative decision *inter alia* imposing the fine. For example, Article 15<sup>2</sup> of the Unfair Commercial Practice Prohibition Law provides that the centre can impose the penalty for unfair commercial practice in amount of 10% from the net turnover of the trader's last year but not more than 100'000 EUR (Article 15<sup>2</sup>). In one case the centre established that the non-bank creditor originated not less than (!) 2'430 268,68 EUR damage to consumers as from 1 January to 26 October 2016 and imposed the penalty in amount of 80'000,- EUR – 0,24% from the net turnover of 2015 (in amount of 33'469'678 EUR) (appeal is pending in the Administrative court).<sup>531</sup> Ironically, the consumers are not getting any cent and we also can discuss whether this is proportional fine comparing with the caused damage. Moreover, the case was appealed thus the penalty is not paid until the final judgment is taken.

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<sup>529</sup> Ruprecht-Karls-Universitat Heidelberg Study JUST/2010/JCIV/CT/0027/A4 „Evaluation of contributions to the public consultation and hearing: Towards a Coherent European Approach to Collective Redress, 2011, p. 372. Available at [http://ec.europa.eu/competition/consultations/2011\\_collective\\_redress/study\\_heidelberg\\_contributions\\_en.pdf](http://ec.europa.eu/competition/consultations/2011_collective_redress/study_heidelberg_contributions_en.pdf).

<sup>530</sup> Latvijas iedzīvotāju zināšanas par savām patērētāja tiesībām un pieredze ar nekvalitatīvu vai nedrošu preču/pakalpojumu iegādi [Knowledge of the Latvian citizens on their consumer rights and experience with non-conforming goods/services]. Consumer Rights Protection Centre and SKDS, 2016, p.12. Available in Latvian [http://www.ptac.gov.lv/sites/default/files/1.atskaite\\_ptac\\_2016\\_003.pdf](http://www.ptac.gov.lv/sites/default/files/1.atskaite_ptac_2016_003.pdf).

<sup>531</sup> The Consumer Rights Protection Centres decision in consumers' collective violation case No. 10-pk, 21 February 2017.

### **c. Incompatibilities with the Recommendation's principles**

Latvia does not actually follow the recommendation. Only publicly available document expressing the Latvia's opinion regarding the collective redress is the answer to European Commission's public consultation: "Towards a Coherent European Approach to Collective Redress".<sup>532</sup> In this answer Latvia is very reserved stating that due to the capacity of the courts and economic situation, it facilitates the development of the out-of-court mechanisms. However, firstly, we cannot really state that there is successful mechanism of out-of-court compensatory collective redress in Latvia. Secondly, there is no judicial collective redress available. It is also stated in the Latvia's opinion that even though there is no special norms on collective redress provided in Civil Procedure Law, still it is possible in Latvia to merge the claims or submit one claim against number of persons.<sup>533</sup> This is criticized as the general norms of the civil procedure are not favourable for the collective redress.<sup>534</sup> Both in individual and collective claims consumers are deter from going to court. Also the "courts' capacity" excuse is not grounded. Thus the purpose of the recommendation – to facilitate access to justice and to obtain compensation in mass harm situations – is not foreseen in Latvia.

If Latvia more or less effectively introduced the legal mechanisms to stop illegal practices then the mechanism for the injured persons to obtain compensation and damages in mass harm situations is still not developed.

Recommendation indicates certain requirements as to the designated non-governmental representative entity; however, Latvia has not followed the Recommendation. According to the law, theoretically, the Consumer Rights Protection Associations has the right to submit the statement of claims to the court for protecting the interests and rights of consumers; however, practically, there are no special procedural mechanisms or support for the association to litigate. Furthermore, the Consumers Right Protection Centre is the central institution for the collective redress. It is state institution and the Centre has the right to offer the trader to sign the written commitment acknowledging the violation of the consumers' rights or to initiate injunction procedure. Moreover, the Centre indicates the priority areas of supervision (included in the current year's plan or taking into consideration the financial resources etc.) thus it might not indicate all violations of the collective interests. According to the law, the consumer associations and consumers can submit the application to the Centre to investigate the collective interest violation; however, the Centre has exclusive right to decide whether initiate the case or not. In addition, even, despite the unsuitable civil procedure, if the association would like to submit the statement of claim in the name of the consumers, according to the current law, the association shall acquire power of attorney from each of the members of the group but this is essential obstacle for effective collective redress.<sup>535</sup> By adopting such strict approach,

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<sup>532</sup> Latvijas viedoklis attiecībā uz Eiropas Komisijas paziņojumu "Ceļā uz visa Eiropas Savienībā vienotu pieeju kolektīvo prasījumu jautājumos". Available: [http://ec.europa.eu/competition/consultations/2011\\_collective\\_redress/latvian\\_authorities\\_lv.pdf](http://ec.europa.eu/competition/consultations/2011_collective_redress/latvian_authorities_lv.pdf)

<sup>533</sup> Ibid. p.5.

<sup>534</sup> Paupe E.Kolektīvās prasības un to problemātika Eiropas tiesību sistēmā: starptautisko privāttiesību aspekti [Collective actions and Problematic Issues in European law system: aspects of Private international law]. University of Latvia, Faculty of Law, Master Thesis, 2013, p.63.

<sup>535</sup> Paupe E.Kolektīvās prasības un to problemātika Eiropas tiesību sistēmā: starptautisko privāttiesību aspekti [Collective actions and Problematic Issues in European law system:

Latvia has limited the initiative of the consumer groups and associations and they very much depend on the Centre.<sup>536</sup>

There is no regulation regarding cross border cases, opt-in or opt-out, funding, fees thus in this regard the Recommendation is not addressed in the national legislation.

It is reported that the Consumer Rights Protection Centre and the Competition Council was in favour to introduce the opt-out collective redress in the courts, however the Ministry of Justice has denied this proposal.<sup>537</sup> In this regard, it shall be mentioned that the Consumer Rights Protection Centre is under supervision of the Ministry of Economics, not the Ministry of Justice, may be therefore the consumer right protection is not the priority of the latter.

The Recommendations indicate that the member states should ensure that the collective redress procedures are fair, equitable, timely and no prohibitively expensive. This is not the case in Latvia.

#### **d. Problems relating to access of justice/fairness of proceedings including**

Lack of the collective redress procedure in the court directly affects the fairness of proceedings as the individual litigations are more time consuming and puts burden for the consumer.<sup>538</sup> Now, to litigate the consumer disputes is very expensive thus there is limited number (or even none) of disputes where the statement of claim is submitted by the consumer against the trader in the courts of Latvia.

In its answer, Latvia also expressed the view that the right to represent the consumers in the collective redress shall be granted to the particular subject that has relevant competences and has no personal interest in the case, without the goal to gain popularity, new clients and the profits.<sup>539</sup> Basically, it is suggested that such redress hypothetically could be submitted by the publicly authorized organization; however, it is also criticized as such model would not facilitated the individual initiative of the consumer but instead the group of consumers will depend on the institution or organization.<sup>540</sup> In our view, the Consumer Rights Protection Centre has the relevant competences and also according with the current Law the Centre shall have the right to submit a statement of claim to a court (Article 25(6) of Consumer Rights Protection Law); however, there are no supporting rules in civil procedure law. Moreover, it is questionable whether the organizational and financial capacity of the Consumer Rights Protection Centre or the consumer associations allows litigation of collective claims.

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aspects of Private international law]. University of Latvia, Faculty of Law, Master Thesis, 2013, p.13

<sup>536</sup> Ibid.p.65.

<sup>537</sup> Ibid.p.64.

<sup>538</sup> Ibid.

<sup>539</sup> Latvijas viedoklis attiecībā uz Eiropas Komisijas paziņojumu "Ceļā uz visa Eiropas Savienībā vienotu pieeju kolektīvo prasījumu jautājumos", p.9. Available: [http://ec.europa.eu/competition/consultations/2011\\_collective\\_redress/latvian\\_authorities\\_lv.pdf](http://ec.europa.eu/competition/consultations/2011_collective_redress/latvian_authorities_lv.pdf)

<sup>540</sup> Paupe E.Kolektīvās prasības un to problemātika Eiropas tiesību sistēmā: starptautisko privāttiesību aspekti [Collective actions and Problematic Issues in European law system: aspects of Private international law]. University of Latvia, Faculty of Law, Master Thesis, 2013, p.65.

- Restrictions on access to justice negatively affecting collective redress
- Time and burden of collective actions on courts and parties compared to non-collective litigation
- Risks of and examples for abusive litigation
- Effective right to obtain compensation
- See above.

## II. Information on Collective Redress

### National Registry

Web page of the Consumer Rights Protection Centre – decisions in administrative cases and the data base of written commitments ([www.ptac.gov.lv](http://www.ptac.gov.lv)).

## III. Case summaries

<p><b>Case name</b> Written acknowledgment by SIA „IPF Digital Latvia” dated 27.03.2017</p> <p><b>Reference</b></p> <p><b>Subject area</b> Consumer crediting</p>	<p><b>Keywords</b> Consumer crediting, limitation in damages, crediting agreement</p> <p><b>Summary of claims</b> The non-bank creditor has charged the consumers „unpaid creditor’s damages” and added those costs when the particular consumer case has been forwarded for the out-of-court debt collection.</p>
<p><b>Dispute resolution method</b> Written acknowledgment</p> <p><b>Court or tribunal</b> Consumer Rights Protection Centre</p>	<p><b>Findings</b> The creditor acknowledged that such damages exceed the amounts that could be charged in accordance of the law.</p>
<p><b>Cross-border character/ implications, if any</b></p>	<p><b>Outcomes</b> The company shall pay to the consumers illegally charged amounts if the consumer requests so.</p>
<p><b>Opt-in/out</b> Opt-in</p>	
<p><b>Type of funding</b> none</p>	

<b>Costs</b> yes	
<b>Abusive litigation</b> no	

<p><b>Case name</b> CRPC decision in the SIA „VIA SMS“ case of consumers' collective interest violation dated 21.02.2017</p> <p><b>Reference</b> No. 8-pk</p> <p><b>Subject area</b> consumer</p>	<p><b>Keywords</b> Non-bank consumer crediting</p> <p><b>Summary of claims</b> Unfair commercial practice as there was violation of law in calculation of the total costs of the credit. The non-bank creditor refused to sign the written commitment and disagree with CRPC's interpretation of the law.</p> <p><b>Findings</b>  </p> <p>Total amount of the damages for the company's clients – appr.128'307,27 EUR</p> <p><b>Outcomes</b>  </p> <p>Administrative penalty in amount of 9'000,- EUR to be paid to state budget. No compensations for the consumers.</p>
<p><b>Dispute resolution method</b> Administrative case</p> <p><b>Court or tribunal</b> Appealed in Administrative court</p>	
<p><b>Cross-border character/ implications, if any</b> no</p>	
<p><b>Opt-in/out</b> no</p>	
<p><b>Type of funding</b> none</p>	
<p><b>Costs</b> no</p>	
<p><b>Abusive litigation</b> no</p>	

<p><b>Case name</b> CRPC decision in the SIA „Soho Group“ case of consumers' collective</p>	<p><b>Keywords</b> Non-bank consumer crediting</p> <p><b>Summary of claims</b></p>
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<p>interest violation dated 21.02.2017</p> <p><b>Reference</b></p> <p>No. 11-pk</p> <p><b>Subject area</b></p> <p>consumer</p>	<p>Unfair commercial practice as there was violation of law in calculation of the total costs of the credit. The non-bank creditor refused to sign the written commitment and disagree with CRPC's interpretation of the law.</p> <p><b>Findings</b></p> <p>Total amount of the damages for the company's clients – appr. 370'591,73 EUR</p> <p><b>Outcomes</b></p> <p>Administrative penalty in amount of 25'000,- EUR to be paid to state budget. No compensations for the consumers.</p>
<p><b>Dispute resolution method</b></p> <p>Administrative case</p>	
<p><b>Court or tribunal</b></p> <p>Appealed in Administrative court</p>	
<p><b>Cross-border character/ implications, if any</b></p> <p>no</p>	
<p><b>Opt-in/out</b></p> <p>no</p>	
<p><b>Type of funding</b></p> <p>none</p>	
<p><b>Costs</b></p> <p>no</p>	
<p><b>Abusive litigation</b></p> <p>no</p>	

<p><b>Case name</b></p> <p>CRPC decision in the AS „4finance“ case of consumers' collective interest violation dated 21.02.2017</p> <p><b>Reference</b></p> <p>No. 10-pk</p> <p><b>Subject area</b></p> <p>consumer</p>	<p><b>Keywords</b></p> <p>Non-bank consumer crediting</p> <p><b>Summary of claims</b></p> <p>Unfair commercial practice as there was violation of law in calculation of the total costs of the credit. The non-bank creditor refused to sign the written commitment and disagree with CRPC's interpretation of the law.</p> <p><b>Findings</b></p> <p>Total amount of the damages for the company's clients – appr. 2'430'268,68 EUR</p>
<p><b>Dispute resolution method</b></p> <p>Administrative case</p>	



<b>Court or tribunal</b> Appealed in Administrative court	<b>Outcomes</b>  Administrative penalty in amount of 80'000,- EUR to be paid to state budget. No compensations for the consumers.
<b>Cross-border character/ implications, if any</b> no	
<b>Opt-in/out</b> no	
<b>Type of funding</b> none	
<b>Costs</b> no	
<b>Abusive litigation</b> no	

<b>Case name</b> Written commitment by SIA „E-Lats“ dated 27.10.2016	<b>Keywords</b> Consumer crediting  <b>Summary of claims</b> The company acknowledges that have charged its consumers higher costs for prolonging the repayment of the credits than provided in the law and undertakes to compensate the consumers upon their request.  <b>Findings</b>  <b>Outcomes</b> Company undertake to change the charges as well as upon application of the consumers to compensate sums overpaid by the consumer.
<b>Reference</b> No.4/10	
<b>Subject area</b> consumer	
<b>Dispute resolution method</b> Written commitment	
<b>Court or tribunal</b>	
<b>Cross-border character/ implications, if any</b> no	
<b>Opt-in/out</b> Kind of opt in	
<b>Type of funding</b> [none][third party funding?]	
<b>Costs</b>	

no	
<b>Abusive litigation</b>	
no	

<p><b>Case name</b></p> <p>CRPC decision in the SIA „MEDICOM ALLIANCE case of consumers' collective interest violation dated 29.04.2016</p> <p><b>Reference</b></p> <p>No. 12-pk</p> <p><b>Subject area</b></p> <p>Unfair commercial practice Misleading advertising</p>	<p><b>Keywords</b></p> <p>Unfair commercial practice, misleading advertising</p> <p><b>Summary of claims</b></p> <p>Unfair commercial practice as there was violation of law in advertising food supplements</p> <p><b>Findings</b></p> <p>The Centre itself found that the trader has distributed around 20000 copies of misleading advertising thus the violation is fundamental.</p> <p><b>Outcomes</b></p> <p>Administrative penalty in amount of 2617,- EUR (1,5% of the turnover of the company in 2014) to be paid to state budget. No compensations for the consumers.</p>
<p><b>Dispute resolution method</b></p> <p>Administrative case</p>	
<p><b>Court or tribunal</b></p>	
<p><b>Cross-border character/ implications, if any</b></p> <p>no</p>	
<p><b>Opt-in/out</b></p> <p>no</p>	
<p><b>Type of funding</b></p> <p>none</p>	
<p><b>Costs</b></p> <p>no</p>	
<p><b>Abusive litigation</b></p> <p>no</p>	

<p><b>Case name</b></p> <p>CRPC decision in the SIA „Vienotais norēķinu centrs" case on temporary provisions regarding unfair commercial practice dated 04.04.2017</p>	<p><b>Keywords</b></p> <p>Out-of court debt collection Unfair commercial practice</p> <p><b>Summary of claims</b></p>
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<p><b>Reference</b> No. 3.3-7/2294/F-24</p> <p><b>Subject area</b> Out-of-court debt collection</p>	<p><b>Findings</b></p> <p>The licensed out-of-court debt collector distributed information what is not in conjunction with the Out-of-court debt collection law and is considered as unfair commercial practice.</p> <p><b>Outcomes</b></p> <p>Remedy: interim measure to stop the practice.</p>
<p><b>Dispute resolution method</b></p> <p><b>Court or tribunal</b></p>	
<p><b>Cross-border character/ implications, if any</b></p>	
<p><b>Opt-in/out</b></p>	
<p><b>Type of funding</b> no</p>	
<p><b>Costs</b> no</p>	
<p><b>Abusive litigation</b> no</p>	

# LITHUANIA – FACTSHEET

## **Scope**

Two horizontal mechanisms available:

- 3) Action for protection of public interest (injunctive relief)
- 4) Group Action proceedings (both injunctive and compensatory relief)

Joinder of parties, consolidation of proceedings available.

## **Standing** (Para. 4-7)

### Action for protection of public interest

Standing is restricted to a prosecutor, state, municipal authority or other persons identified in law. Precise conditions for standing under this mechanism are contained in sector specific laws e.g. consumer, competition and environmental.

The conditions indicated in para 4 (a), (b) of the Recommendation usually are established in the law or indicated by the court practice.

### Group Action proceedings

No specific provisions on standing.

## **Problems/Incompatibilities with Recommendation principles**

The rule indicated in para 5 literally does not exist in Lithuania, however, if the person does not meet the criteria established in the laws, the claim will not be accepted by the court.

## **Admissibility** (Para. 8-9)

Early determination of admissibility questions.

### Public Interest

Only locus standi is checked.

### Group Action Proceeding

Upon receipt of claim, defendant has 7 days to respond. Group needs to be constituted between 60-90 days. Requirement of numerosity (20 members of group) and commonality (group share common questions of law and fact, including protection of rights and interests)

## **Information on Collective Redress** (Para. 10-12, 35-37)

### Group Action Proceeding

Group representative must publish announcement containing information about the group action. Court required to publish existence of action on internet site of court after acceptance.

## **Problems/Incompatibilities with Recommendation principles**

No National Registry.

Law does not indicate criteria/method for announcement of information by group rep.

## **Funding** (Para. 14-16)

No regulation of financing of litigation.

## **Problems/Incompatibilities with Recommendation principles.**

No specific rules on the control of third party funding.

Claimant party not required to declare the origin of any funding to the court at the outset of proceedings.

No specific rules on whether court is allowed to stay proceedings if the instances outlined in para. 15 of the Recommendation exists.

#### **Cross Border Cases** (Para. 17-18)

Apart from Law on Consumer Protection, there are no restrictions.

##### Consumer Protection

Foreign plaintiffs are able to defend the public interest of consumers on on the following conditions:

Firstly, they may act only when the activities of the sellers (suppliers) of goods and services, functioning in Lithuania, infringe the legal acts of the European Union, the list of which shall be approved by the Minister of Justice of the Republic of Lithuania. Secondly, they have an obligation to consult in writing with the State Consumer Rights Protection Authority. Furthermore, foreign plaintiffs likewise have to apply to the seller or service provider before bringing the claim before the court.

#### **Expedient procedures for injunctive orders** (Para. 19)

Depends on the type of injunctive order being sought. If preliminary: yes, if final: no

#### **Efficient enforcement of injunctive orders** (Para. 20)

Injunctive order supported by imposition of criminal liability for breach.

No specific rules on monetary sanctions in the regulation of collective redress. The general rule of enforcement and Criminal Code are applied.

#### **Opt In/Opt Out** (Para. 21-24)

Opt-in for both group actions and public interest.

##### Group Action

Conditions prescribed by law (Art. 441 of the Civil Procedure Code)

- a) Ind. Needs to express consent in written form
- b) Statement submitted to group rep

Each member of the group action is able to exercise his/her right to leave the group, normally before the adoption of the final decision on the composition of the group by the court. A party may join the group after the stage of admissibility and certification if group rep. and defendant consents.

#### **Problems/Incompatibilities with Recommendation principles**

Member not freely able to to leave group before final judgement.

#### **Collective ADR and Settlements** (Para. 25-28)

Parties are encouraged to settle compensation disputes consensually or out of court. Court shall check settlement agreements concerning capability, imperative norms and public interests.

#### **Problems/Incompatibilities with Recommendation principles**

No appropriate collective ADR available

#### **Costs** (Para. 13)

Loser pays principle applies, however the court has a wide discretion as to what is "reasonable"

**Lawyers' Fees** (Para. 29-30)

Success/contingency fees allowed. Civil procedure code inserts requirement that only expenses that are reasonable and necessary recoverable. No cap in group action

**Problems/Incompatibilities with Recommendation principles**

No restrictions on use of success/contingency fees

**Prohibition of punitive damages** (Para. 31)

Punitive or extra-compensatory damages not allowed. Skimming off/restitution of profits not available

**Collective Follow- on actions** (Para 33-34)

There is no specific requirement that the subsequent private proceedings start only after the conclusion of the public authority action. There are no special limitation rules in follow-on cases.

**Problems/Incompatibilities with Recommendation principles**

No specific requirement that the subsequent private proceedings start only after the conclusion of the public authority action.

**Interplay between injunctions and compensation across all sectors**

Group Action proceedings allow injunction and compensation within one single action in all areas. Possible to rely on injunction in separate follow on damages action.

**Problems/Incompatibilities with Recommendation principles**

No specific general rule concerning prejudicial facts exist in case the person was not involved in the proceeding

# LITHUANIA – REPORT

## I. General Collective Redress Mechanism

The Lithuanian legal system provides two main collective redress mechanisms. Both are contained in the Lithuanian Civil Procedure Code (CPC): the mechanism linked to the protection of the public interest (Article 49 of the CPC) and the group action proceeding (the chapter 24/1 of the CPC). In addition to these, a joinder of claims mechanism is used.

### 1. Scope/ Type

The mechanism linked to the protection of the public interest and the group action proceeding are horizontal mechanisms. In practice, the protection of the public interest is used to gain injunctive relief whereas the group action proceeding is used for both injunctive and compensatory relief. As for joinder of claims, the CPC establishes two forms of joinder of claims: compulsory joinder and optional joinder. Compulsory joinder is used when claim is brought by several co-plaintiffs together or against several defendants if the subject of a claim is rights or liabilities assumed by them together in accordance with laws. Optional joinder is used when a claim is brought by several co-plaintiffs together or against several defendants if the subject of a claim is rights or liabilities of the same nature, based on the same matter on actual and legal issues, when each separate demand could be a subject of an independent claim (optional joinder).

### 2. Procedural Framework

#### a. Competent Court

The mechanism linked to the protection of the public interest is subjected to general rules of jurisdiction. Accordingly, district courts are the competent courts.

Due to the novelty and complexity of the group action proceeding, specific rules of jurisdiction are followed and regional courts are the competent courts.

Joinder of claims procedures are subjected to general rules of jurisdiction. District courts are competent.

#### b. Standing

##### Protection of public interest

Article 49 states that the claim to protect the public interest could be submitted only by a prosecutor, state, municipal authority or other persons appointed by law. Although the law does not make an exhaustive list of subjects, any other persons defending the public interest must establish that the law authorizes them to defend public interest. Therefore, only a limited number of subjects could bring this form of action. Additionally, the CPC does not indicate a set criteria that such person(s) must fulfil. As it concerns the conditions stipulated para. 4 of the Commission Recommendation, sector

specific laws and cases provide the legal background for locus standi and practice. So, for example the Law on Consumer Protection indicates certain criteria for consumer organizations. The rule indicated in para 5 does not exist in Lithuania, however, if the person does not meet the criteria established in the laws, the claim will not be accepted by the court. Consumer protection is discussed below.

There are no national lists of entities authorised to defend the public interest, the court decides on locus standi of each subject in each case.

### **Group action**

There are no specific provisions on locus standi, i.e. there are neither any explicit restrictions concerning persons able to file a group action, nor a list of subjects that are permitted to bring a group action. The specific rules only existed concerning a group representative. It should be added that a representative action cannot be brought under the rules for group actions.<sup>541</sup> However, the association or trade union is entitled to be a group representative, (i) if the claims provided in the form of a group action arose from the legal relationship directly related to its objectives provided in its articles of association, and (2) if no less than ten plaintiffs of the group action are members of the association or trade union. In this case, the members of the group might not only be the members of the association or trade union. However, the association or trade union should represent the interests of all group action plaintiffs. This regulation of legal standing is considered a representative action, where a representative entity is certified to bring an action. However, what is important is that the persons who have been harmed in a mass harm situation be a party to the proceeding.

### **Joinder of Claims**

There are no specific provisions on locus standi relevant to this mechanism.

#### **c. Availability of Cross Border collective redress**

No restrictions are indicated. As indicated below, specific provisions concerning the competence are indicated in the Law on Consumer Protection.

#### **d. Opt In/ Opt Out**

### **Protection of public interest**

Concerning the mechanism linked to the protection of the public interest, in principle opt – in mechanism is available according to the CPC. However, it is recognized by the scholars that the consequences of the decision (res judicata) should apply to the persons who did not participated in the procedure. That conclusion is made due to the nature of the procedure – an injunction procedure.

### **Group action**

Only an opt – in mechanism is available according to the CPC in the group action proceeding. The conditions are prescribed by law. The opt-in model signifies that the group of claimants is constituted on the basis of consent of all those claiming to have been injured or harmed. The justification for the model was based in principle on the fact that only a few European countries

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<sup>541</sup> The representative action described in the Recommendation, cannot be brought under Lithuanian law.



have started implementing an opt-out system in their national law. The opt-in principle is evident in several articles of the CPC. First, the CPC clearly states that an individual shall express in written form their consent to participate in a group action, and must submit it to the court (point 1 of Part 2 Article 441/3). Accordingly, the individual joining the group must submit a statement to the group representative (a statement should be provided in the form adopted by the Minister of Justice<sup>542</sup>). The written statements of the group action plaintiffs, together with the list of participants in the group action, shall be submitted to the court. Secondly, the group representative should publish an announcement<sup>543</sup> with information about the group action, as well as information for the individuals who wish to join the group. Thirdly, new plaintiffs may be added to the group. When accepting the claim, the court will establish a deadline for joining the group action. After amendments to the claim are made, the court shall finally decide whether all plaintiffs may be included in the group, and confirm the final composition of the group (Article 441/7 and 441/8 of the CPC). A person is free to decide whether to join or withdraw from the group, and this right cannot be restricted. After the final confirmation of the group's composition, new plaintiffs may only be added if there exist serious grounds to do so, and only upon approval by the defendant and the group representative (Part 8 of the CPC, Art. 441/8).<sup>544</sup> The application in such case is made to the court and not to the group representative. According to the Art 441/5 of the CPC each member of the group action is able to exercise his/her right to leave the group. However, he/she might realize this right before the adoption of the final decision on the composition of the group by the court (this decision must be adopted at the beginning of the procedure - admissibility and certification stage).

In case the number of plaintiffs in the group falls below the minimum requirement (see e. Main procedural rules below), it is at the discretion of the court to decide whether the action should go forward according to the rules of the collective group action, taking into account the effectiveness, suitability, and expedience of the process (Article 441/11 of the CPC).

#### **e. Main procedural rules**

##### **Protection of public interest**

Locus standi is checked by the judge.

##### **Group action**

The main procedural peculiarities of the group action under Lithuanian law are related to (i) the rules concerning admissibility and certification of the group, (ii) the role of the court, (iii) the requirement to publish information, (iiii) rules on the allocation of the litigation expenses (discussed above) and (iv) rules relating to amendment of the group and the realization of the procedural rights and obligations of the group.

In case of group action proceeding the main requirements are indicated in the law:

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<sup>542</sup> An example of the form of written statement is approved by the Minister of Justice (The Order of the Ministry of Justice No 1R-378, 2014-12-22).

<sup>543</sup> An example of the form of the announcement is approved by the Minister of Justice (The Order of the Ministry of Justice No 1R-378, 2014-12-22).

<sup>544</sup> It is not applied in case where the individual claim was provided before the final confirmation of the group. In that case the claimant shall withdraw the claim on the basis of the Article 139 of the CPC and become the member of the group.

- the group should be formed. The formation of the group depends on two factors: numerosity and commonality. The minimum number of the members of the group should be 20 plaintiffs. As it was mentioned if the number of the members falls below the mandatory threshold, it is at the discretion of the court to decide whether to pursue the claim. The list of the members of the group and the written consent to participate in a group action must be submitted to the court. The commonality factor requires the members of the group to share common questions of law or fact, including protection of rights and interests;
- the group should be represented by adequate representative. The arguments proving the legitimacy of the representative should be indicated in the statement of the group claim. Accordingly, the court, while considering the issue of admissibility of the case, should consider the legitimacy of the group representative, by evaluating the fairness of the representative, their reputation, whether the representative is competent to take on the role, their experience and behavior in similar cases, and whether a conflict of interest exists between the group representative and the group members. The principle of proper representation requires the court to suggest that the group change its representative if it finds that the representative does not act properly on behalf of the group;
- the group should be represented by a lawyer (mandatory group representation principle);
- the arguments justifying that the group action is more purposive, effective and proper way to solve the dispute than the individual process should be submitted;
- the evidence proving the fulfillment of an out – of court procedure should be submitted to the court. The group action is subject to mandatory out-of-court negotiations, and the court will only accept the group action if the parties have failed to resolve their dispute peacefully by prior mutual agreement.

The group action proceeding in principle is a multi-stage process. The acceptance of the claim is very important stage of the procedure, where admissibility and certification issues are solved. Before acceptance of the claim, court provides the claim for the defendant indicating seven days for submission of reply. The reply should reflect the opinion of the defendant concerning the acceptance of the claim. If the court accepts the claim, this acceptance should be appealed within seven days of acceptance. After acceptance of the claim court shall indicate the term for the final formation of the group. The term may vary from 60 to 90 days taking into account the essence of the case and the size of the group. The additional 30 days may be indicated according to the request of the group representative. The representative of the group should within 14 days submit to the court the renewed list of the group and, if necessary, renewed claim. The defendant has a right to submit the opinion concerning these documents. The court should decide on the acceptance of renewed claim and list of group and should adopt the final list of the group.

As the group is formed, the claim after preparation stage of the case could be examined in the court hearing. In principle, general procedural rules are applied for the preparation and examination of the case. Several specific rules of group action case management are indicated in the CPC. There are specific rules on litigation expenses (on the payment of the official fee and division of litigation expenses between members of the group). The procedural documents are delivered to the representative of the group or advocate. The court should be active if the proper representation principle is breached. In

case of wrongly representation of the advocate or representative of the group the court may propose to the representative or the group or the members of the group (accordingly) to change the advocate or the representative of the group. The court may decide to invite the members of the group to the hearing if it is needed for the duly examination of the case. If the group is reduced, the court may decide on further examination of the case according to the rules of group action proceeding.

The publicity requirement is directed at both the group action's representative and to the court. The representative of the group action is obliged to publish an announcement inviting potential plaintiffs to join the group action proceedings. The court is obliged to publish on a specific website the information about any developments in the group action (after its acceptance), whether the group has been ordered to replace its representative, information concerning the group's disapproval of the candidate for representative of the group, or any other developments, such as when the group does not have a representative, if the plaintiffs propose to change the representative of the group upon the recommendation of the court who has determined that the representative acts improperly, or information concerning the replacement of the representative during the appeal process.

There are no specific rules on interim measures and discovery in case of group action proceeding.

### **Joinder of Claims**

Joinder of claims mechanism has several specific rules in the CPC. The commonality requirement is applied (Article 43 of the CPC). Each and every participator acts on his/her own behalf, however participators may agree to have the case conducted by one of the participators. Each and every participator shall have the right to independently conduct a case. All participators, for whom the case is not closed, shall be summoned to a court session. The specific rule for delivery of court documents is indicated - in case of joinder of claims when no one single representative has been appointed by the participators, the court shall be entitled at the request of the opposing party or on its own initiative to recommend to the co-parties that they appoint one of their number or another entity as the authorised representative to receive the court documents connected with the case. If the participators fail to appoint the authorised representative, the court shall be entitled, at the request of the other party or on its own initiative, to appoint by a ruling an authorised representative at the expense and risk of the co-parties if in this way the course of the procedure will be expedited and streamlined. The ruling may be amended or annulled by the court if the participators state that they have a legal interest to not be represented by one person. In case of joinder of claims, copies of the court documents shall be submitted to the court for all the co-parties/participators.

Accordingly, the CPC establishes the consequences of the procedure of the mechanism of joinder of claims – in case of compulsory joinder, the outcome of all procedural actions performed by participators that participated in a hearing shall also be applied for those participators that failed to appear in the hearing without a sound reason. Agreement of all participators (co-plaintiffs or co-defendants) is mandatory to conclude a settlement, waive a claim or accept the same.

### **3. Available Remedies**

As mentioned above, the protection of the public interest mechanism is, in practice, used for injunctive relief. Other types of collective redress mechanism might be applied for all types of damages. All types of mechanisms (with exception the mechanism linked to the protection of the public interest, which is designed for the injunction action) allow to seek an injunction and compensation within one single action. The enforcement of final injunctive orders is supported by the imposition of criminal liability where a party has failed to adhere to that order. Where a preliminary injunctive order is sought, the regular procedure is expedited.

The specific regulation existed in case of group action proceeding. If compensatory claim is submitted to the court according to the rules on group action proceeding, the claim concerning damages is examined as individual claim. Therefore, no specific rules existed concerning allocation of damages between claimants for compensatory claims.

Punitive or extra-compensatory damages are not allowed according to the Civil Code of the Republic of Lithuania. The skimming-off/ restitution of profits scheme is not available in Lithuania.

There are no specific rules concerning limitation periods in collective redress mechanisms.

### **4. Follow-on claims**

There are no general rules on follow - on cases. Only specific rules exist in the competition area. There is the possibility to rely on an injunction in a separate follow-on individual or collective damages actions. However, there are no clear rules on this. The prejudicial of facts rule exist in Lithuania. Para. 2 of Article 182 of the CPC indicates that circumstances established in effective judgements in other civil or administrative proceedings where participants were the same persons except in cases when the judgement causes legal consequences for other persons not involved in the proceedings shall be considered indemonstrable. No specific general rule concerning prejudicial facts exist in case the person was not involved in the proceeding is provided in the CPC. There is also no specific requirement that the subsequent private proceedings start only after the conclusion of the public authority action. There are no special limitation rules in follow-on cases.

### **5. Costs**

Similar to many European Union Member States, the loser pays principle is the prevailing practice in the Lithuanian civil procedure. The regulation of the group action mechanism does not overrule this principle.

As it was mentioned, the CPC establishes special rules for the split of litigation costs between the group members. The dominating principle is equality; litigation expenses incurred by the party in whose favour the judgment was made shall be awarded by the court to the group action plaintiffs in equal parts.

## **6. Lawyers' Fees**

The financing issues of the group action mechanism were not taken into account and regulated when the group action mechanism was introduced into the Lithuanian legal system. The success fee was enacted in 2004 through the adoption of a new Law on the Bar.<sup>545</sup> The Article 50 of this law establishes that in civil cases a party is allowed to agree that the advocate's fee would depend on the outcome of the case, unless agreeing on a success fee would contradict the rules governing the practice of lawyers. Theoretically, this can lead to abusive and/or frivolous claims. However, there is no practical evidence to date. This rule was not changed or amended with the enactment of the group action in Lithuanian law. The Code of Professional Conduct for the Advocates of Lithuania does not address success fee matters, nor does it explain exceptions to the rule. In principle, the lawyer's fees system does not create an incentive to litigate. The general understanding is that it is rather exception when the rule that the court will award the whole amount of the expenses related to lawyers' fees. In the Lithuanian legal system, lawyer's fees are regulated by the courts. The courts are able to rely on the recommendation adopted by the Minister of Justice. The courts take into account the circumstances of the case (including the complexity of the case).

## **7. Funding**

The CPC does not regulate either financing of the litigation, or contingency or success fees. It only provides that the expenses that are reasonable and necessary for the group representative shall be ascribed to the litigation expenses. The expenses pertaining to legal assistance are included in the litigation expenses, in accordance with the general rules of the CPC. The representative of the group is charged with the surveillance of the allocation of the litigation expenses between plaintiffs of the group. Furthermore, a claimant party is not required to declare the origin of any funding to the court at the outset of proceedings.

However, there are no indications or restrictions in the CPC as to financing from third parties. Similarly, there are no specific rules on whether a court is allowed to stay proceedings if the instances outlined in para. 15 of the Recommendation exists.

## **8. Enforcement of collective actions/settlements**

There are no specific rules on enforcement in case of collective redress mechanisms.

Where a settlement has been reached, there is no particular rule on whether the courts verify whether the rights and interests of all parties are protected. The general rules of the CPC are applied to settlements. According to the general rules and the court practice the court shall check the settlement agreement concerning capability, imperative norms and public interests.

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<sup>545</sup> The Republic of Lithuania Law on the Bar. Law No IX-2066 of 18 March 2004.

## **9. Number and types of cases brought/pending**

Several attempts were made to initiate the group action proceedings, however, they were not successful (4 cases were initiated including the old case concerning non-possibility to apply Article 49 for group actions). Therefore, there has not been adopted any decision within the framework of the group action proceeding yet. By the same time, it means that Lithuania has no court practice in the area of compensatory decisions. Taking into account that the cases pursuant group action proceedings rules were not examined, they are not involved in the Case examples below. The grounds for non – accepting the claims as group action claims were: (i) there is no commonality between requirements, therefore common decision is not possible; (ii) there was no proper out of court procedure.

## **10. Impact of the Recommendation/Problems and Critiques**

It should be noted that the Recommendation was not specifically transposed into Lithuanian laws. There is no clear information whether the Recommendation was taken into account in the process of the adoption of the Amendments to the CPC by introducing the group action proceeding: neither the wording of these Amendments, nor their *travaux préparatoire* provide reference to it.

Even though no reference was made to the Recommendation when the group action mechanism was enacted in Lithuanian law, the Lithuanian group action model corresponds in essence to the concept indicated in the Recommendation because it reflects the main safeguards established in the Recommendation.

Certain instruments stated in the Recommendation are not transposed into the Lithuanian legal system.

First, Lithuanian law does not have rules regulating third party funding, a demand which may arise in the future. Further, the Lithuanian regulation allows a success fee and does not provide any particular restrictions on this for group actions. It should be considered whether the general restriction referring to the ethical principles will be an appropriate safeguard ensuring the party right to full compensation.

Secondly, Lithuanian regulation does not clarify the relationship between public enforcement and private enforcement. In order to correctly comply with the Recommendation concerning the consistency of public enforcement of the collective redress mechanism, the regulation of all administrative processes which are designed to protect individual rights consecrated in EU law should be reviewed, and the Lithuanian regulation on collective redress should establish clear rules regarding those mechanisms, whilst ensuring the mechanism's effectiveness.

Thirdly, the law does not indicate any criteria or method of the announcement provision relating to the information, which can be furnished by the group representative.

Finally, Lithuania has not created the registry for the collective redress actions, neither for claims realized through the protection of public interest, nor for group actions.

Additional practical issue might be noticed that the requirement to implement obligatory out of court procedure is not coordinated with the out of court procedure pursuant to the sectoral laws. The ADR procedure established in the sectoral laws does not allow group actions or collective redress actions.

As it was mentioned, there were only several attempts to initiate group actions proceedings and have not been any decisions adopted pursuant to the group action proceedings yet. By adopting the concept on Group action, the Government considered that there is a risk that group action mechanism might be used in practice for abuse purposes and might be dangerous for business. Current situation reveals that this mechanism actually does not work in practice. However, ex post evaluation on the implementation of the group action proceeding mechanism is not fulfilled and there is no clear reasons why the group actions proceeding does not attract of consumers organizations or other persons as a measure for the protection of their rights. The scholars are discussing that the group action proceeding mechanism is too complicated and too much discretion belongs to judges. By the same time, it is recognized that there are no expectations that the group action proceeding will be frequently used in practice.

Theoretically, there might be the situation where the members of a group action might be the members of association/trade union and non-members may be inadequately represented. Such a situation might create some difficulties. In case such difficulties would be asserted, the question of proper representation might be raised. As we do not have any actions initiated by these subjects it is very difficult to comment

## **II. Sectoral Collective Redress Mechanism(s)**

### **A. Competition sector**

#### **1. Scope/ Type**

The Law on Competition establishes two instruments:

- Injunctive actions in the field of unfair competition (Article 16 of the Law on Competition). This mechanism shall be regarded as an action for the protection of public interest.
- Compensatory and injunctive claims for infringement of competition law was introduced into Lithuanian legal system by transposition of the Damages Directive (infringement of competition law is described as in the Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance (hereinafter – the Damages Directive)) (Articles 43-53 of the Law on Competition). The new regulation came into force from 1 February, 2017. According to the specific rules of the Law on Competition, the court is encouraged to apply the joining of cases mechanism. It does not mean that group action and joinder of claims mechanisms could not be apply. These instruments would be applied according to the rules indicated in the CPC.

## **2. Procedural Framework**

### **a. Competent Court**

For the injunctive actions – a district court would have the jurisdiction to hear the case.

For the compensatory and injunctive actions claims in infringement of competition law – special jurisdiction rule is established in the Law on Competition: Vilnius regional court has jurisdiction to hear the case.

### **b. Standing**

For the injunctive actions – the actions can be brought by organizations representing the interests of undertakings or consumer.

For the compensatory and injunctive actions claims in infringement of competition law -no specific rules on locus standi (with exception of the rules indicated in the Damages Directive concerning indirect purchasers)

### **c. Availability of Cross Border collective redress**

No specific rules are established (with exception of the rules related to the decisions adopted in another Member States).

### **d. Opt In/ Opt Out**

General rules are applied.

### **e. Main procedural rules**

The general rules indicated in the CPC are applied. Several peculiarities are indicated in the Law on Competition. Firstly, follow – on rule is established as required by the Damage Directive (Article 9 of the Damage Directive). Secondly, the court obligation to announce about the initiation of the case is indicated in the law. The announcement should be made after acceptance of the claim on the internet site of the court. The aim of the announcement is to create the conditions for the persons join the case. Thirdly, there is indicated the obligation of the court to join the cases if it has been emerged that more claims are submitted to the court for the same defendant.

## **3. Available Remedies**

As it was mentioned compensatory claims and injunctive claims are allowed. In the field of unfair competition three types of remedies are allowed. Firstly, termination of the illegal actions, secondly, imposition of an obligation to make one or several statements of specific content and form, refuting the previously submitted incorrect information or providing explanations as to the identity of the undertaking or its goods and thirdly, seizure or destruction of the goods, their packaging or other means directly related to unfair competition, unless the infringements can be eliminated otherwise. In case of infringement of competition law, termination of illegal actions and claim for damages are possible.

No specific rules indicated concerning allocation of damages between claimants for compensatory claims and there is no necessity for such rules.

As established by the Damage Directive, there is no availability of punitive or extra-compensatory damages. The same idea is established in Lithuania law.



The rules on calculation and proving of damages, limitation period correspond to the provisions of the Damage Directive. As mentioned above, follow-on rule is established in relation to compensatory claim as required by the Damage Directive.

#### **4. Costs**

General rules are applied.

#### **5. Lawyers' Fees**

General rules are applied.

#### **6. Funding**

General rules are applied.

#### **7. Enforcement of collective actions/settlements**

General rules are applied.

#### **8. Number and types of cases brought/pending**

The injunction mechanism has not been used in practice (where locus standi belongs to associations).

Due to novelty of the regulation no cases existed in the field of compensatory claims.

### **B. Consumer protection sector**

#### **1. Scope/ Type**

Lithuanian law provides for two consumer collective redress mechanisms:

- the general protection of public interest of consumers may be applied when seeking certain remedies - recognition or change of legal relationship, prohibition (termination) of certain actions, omissions of a seller or service provider whereby legitimate common interests of consumers are being infringed upon and which are unfair from the consumers' viewpoint, activities not in compliance with fair business practices, or are in conflict with the provisions of the Lithuanian Civil Code, infringements of the Law on Consumer Protection or any other legislative acts (Chapter 7 of the Law on Consumer Protection);
- the State Consumer Rights Protection Authority controls standard terms and conditions contracts law and therefore may contest unfair terms and conditions of consumer contracts.

It should be noted that these mechanisms cannot be considered a group action, instead it may be regarded as an action for the protection of public interest. The group action, as it was mentioned, is available pursuant to general rules of the CPC.

Only injunctive claims can be submitted to the court within the framework of mentioned mechanisms.

## **2. Procedural Framework**

### **a. Competent Court**

General rules are applied.

### **b. Standing**

Locus standi belongs to consumer associations and the State Consumer Rights Protection Authority. The law establishes certain requirements for the consumer associations. Pursuant the Article 31 of the Law on Consumer Protection consumer associations shall have the right to protect public interests of consumers, provided such associations meet the following conditions: 1) are registered in the Register of Legal Entities; 2) the purpose of operations, indicated in the founding documents, is representation and protection of consumer rights and lawful interests; 3) at least 20 members comprise an association. In the event that the members of an association are other consumer associations, the total number of the members of these associations shall be no less than 20; 4) are independent of business interests and other interests which are related to the protection of consumer rights. When filing a claim or a complaint for the protection of public interests of consumers, a consumer association shall present to the court the evidences that it corresponds to the mentioned conditions.

### **c. Availability of Cross Border collective redress**

Foreign plaintiffs are able to defend the public interest of consumers using this mechanism. Given that natural persons are altogether prohibited from bringing this action, only certain foreign legal persons are allowed. The institutions or organizations of the member states of the European Union which are included by the European Commission in the list provided for by Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests and published in the Official Journal of the European Communities, have the right to bring an action in the courts of the Republic of Lithuania for an injunction to cease activities of the sellers (suppliers) of goods or services which infringe public interests. It must be noted that these foreign plaintiffs have to meet certain criteria. Firstly, they may act only when the activities of the sellers (suppliers) of goods and services, functioning in Lithuania, infringe the legal acts of the European Union, the list of which shall be approved by the Minister of Justice of the Republic of Lithuania. Secondly, they have an obligation to consult in writing with the State Consumer Rights Protection Authority. Furthermore, foreign plaintiffs likewise have to apply to the seller or service provider before bringing the claim before the court.

### **d. Opt In/ Opt Out**

General rules are applied.

### **e. Main procedural rules**

Two stages may be identified. Firstly, obligatory out-of-court dispute resolution. Potential plaintiffs must conduct obligatory out-of-court negotiations. Upon having established that the public interests of consumers

were infringed, plaintiffs must apply to the seller or service supplier and propose that the seller or service supplier cease the infringement of the public interests of consumers within 14 days from the receipt of the proposal. If the infringement of the public interests of consumers does not stop, plaintiffs have a right to file a claim or complaint to the court in order to defend the mentioned interests.

The Law on Consumer Protection states that the plaintiff has an obligation to apply to the seller or service provider before bringing the claim before the court. Additionally, consumer associations and other state and municipal institutions and legal entities defending the public interests of consumers have an obligation, not later than within 5 working days from acceptance of a claim or petition (complaint), to notify the State Consumer Rights Protection Authority about this.

The Law on Consumer Protection does not provide any additional rules regarding evidence or discovery. Consequently, general rules of procedure apply.

### **3. Available Remedies**

As it was mentioned, pursuant to the Law on Consumer Protection this mechanism is designed only for injunctive claims. There are no specific rule concerning follow – on actions and limitation periods in these claims. Several types of remedies are available: (i) plaintiffs may seek recognition or change of legal relationship, prohibition (termination) of certain actions, or omissions of a seller or service provider; (ii) as to the unfair terms and conditions of consumer contracts, the State Consumer Rights Protection Authority may seek invalidation or amendment of unfair terms and condition.

There is no clear rule on *res judicata* effect. The doctrine expressed the position that if the court satisfies the claim, the *res judicata* effect of the judgement applies to all the consumers having clauses in their contracts that have been declared void.

Pursuant to the general rules of the CPC the facts settled in the judgement become prejudicial facts and cannot be contested - therefore persons with the same or very similar factual circumstances may benefit from the decision of the court. As to the unfair terms and conditions of consumer contracts, though the court declares the terms and conditions of the standard consumer contract unfair, due to the contractual nature of the standard consumer contract, it has to be amended individually. For example, a consumer may demand an amendment of the contract with reference to the judgement of the court declaring the particular terms and conditions unfair.

### **4. Costs**

General rules are applied.

### **5. Lawyers' Fees**

General rules are applied.

## **6. Funding**

There are no specific rules on this matter.

## **7. Enforcement of collective actions/settlements**

There are no specific rules on this matter.

## **8. Number and types of cases brought/pending**

Since 2004-04-30, when the amendment of Law on Consumer Protection introducing the protection of public interest of consumers came into effect, several actions were brought to court. According to the publicly available information only 12 cases are accounted. However, it should be noted that the State Consumer Rights Protection Authority in its reports on its activity from 2007 till 2016<sup>546</sup> indicates 37 cases initiated by the State Consumer Rights Protection Authority. Such difference in number of cases might be due to the reason that the decisions of district courts are not publicly available. Moreover, it should be noted, that the State Consumer Rights Protection Authority does not indicate information about the cases initiated by consumer associations.

However, it should be noted that regarding the unfair terms and conditions of consumer contracts, the State Consumer Rights Protection Authority has competence to control the unfair terms in administrative way. Therefore, it actively issues decisions that certain consumer contracts have unfair terms and conditions.

The court practice shows that the issues existed by interpreting the public interests in the consumer area and what the status of the consumers in such case should be. Moreover, it is obvious that there is no clear understanding on the delineation between the abstract control of unfair terms and individual control.

## **9. Impact of the Recommendation/Problems and Critiques**

Please see comments to General part.

Legal scholars rarely address issues of this mechanism. Even so, this institute lacks legal clarity, which would allow potential plaintiffs to take advantage of it. As it is appeared from the court practice there is no clear understanding how "public interests" should be interpreted, what is the abstract control of unfair contract terms and whether all consumers in the status of third party should be involved in the case. It could be additionally noticed that the consumer associations are not sufficiently encouraged to initiate actions for the protection of consumer interests.

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<sup>546</sup> <http://www.vvtat.lt/index.php?2267040817>

## **C. Environmental sector**

### **1. Scope/ Type**

This mechanism may be used only for the protection of public interest in the field of the environment and environmental protection as well as utilization of natural resources (Article 7 of the Law on Environmental Protection).

### **2. Procedural Framework**

#### **a. Competent Court**

Regional Administrative Courts would be competent to hear the case (Article 18 of the Law on Administrative Proceedings). If the requirements in the case involve both requirements of administrative and civil nature and the civil nature prevail, the case might be examined in the general competence courts pursuant the rules established in the CPC. In that case the claim is filed according to Article 49 of the CPC.

#### **b. Standing**

Proceedings may only be brought by the public concerned. Associations and other public legal persons (with the exception of the legal persons established by the State or a municipality or institutions thereof) established in accordance with the procedure laid down by law and promoting environmental protection shall in any case be held as the public concerned. Additionally, according to the practice of Lithuanian administrative courts, associations or other public legal persons must have been established before the adoption of decisions, acts or omissions that are being contested.

#### **c. Availability of Cross Border collective redress**

#### **d. Opt In/ Opt Out**

The law does not specify whether this mechanism is based on the opt-in or opt-out procedure, however general rules of administrative proceedings apply. It should be noted, that the fact that the court decides on the persons that did not participate in the proceedings, would be grounds for the revision of the judgement. Furthermore, due to the nature of the remedies that can be sought, there are no major problems regarding *res judicata*.

#### **e. Main procedural rules**

The Law on Environmental Protection does not provide for any additional procedural rules, consequently general rules of administrative proceedings apply.

Given that there is no specific regulation, the general three-stage administrative proceedings procedure is applied. Firstly, there is the opening of proceedings, during which the court *inter alia* checks the general content requirements of procedural documents. Secondly, the preparation of proceedings, during which the court *inter alia* sends the copy of the claim to the other parties and sets the term for the statement of defence. Thirdly, the proceedings on the merits, during which the court examines the evidence and issues a judgment.

Given that there is no specific regulation, general evidence or discovery rules of the Law on Administrative Proceedings apply.

### **3. Available Remedies**

There are several remedies that the public concerned may seek. Firstly, it may contest the substantive or procedural lawfulness of decisions, acts or omissions in the field of the environment, environmental protection and utilization of natural resources. Secondly, the public concerned may seek an injunction of harmful effects on the environment of the economic operators. Thirdly, to file, in accordance with the procedure laid down by law, a complaint demanding to take appropriate action to prevent or minimize environmental damage or restore the environment to its baseline condition and demanding to punish the persons guilty of causing a harmful effect to the environment and the officials whose decisions or acts (including omissions) has violated the rights of citizens, the public concerned, other legal and natural persons or the interests protected under the law. Lastly, to appeal to the court where it believes that its application, filed in the accordance with the procedure laid down by the legal acts regulating the right to obtain information on the environment has been; unlawfully dismissed, provided with a partially or completely inappropriate response, or has not been given proper regard in compliance with the legal acts regulating the right to obtain information on the environment.

### **4. Costs**

General rules of costs are applied. The Law on Administrative Proceedings states that litigation expenses consist of the official fee, other expenses related with hearing of the case and representation expenses. It should be noted, that reimbursement of representation expenses is settled in accordance with the CPC. Moreover, regarding remuneration of litigation costs, the party for which the judgement has been rendered is entitled to the payment by the other party of the costs incurred by it. Attention should be drawn to the fact that the sum awarded would be proportionate to the claims met. Furthermore, neither the Law on Administrative Proceedings nor the CPC supplies any provisions regarding the funding of this action.

### **5. Lawyers' Fees**

General rules are applied.

### **6. Funding**

General rules are applied.

### **7. Enforcement of collective actions/settlements**

General rules are applied.

## 8. Number and types of cases brought/pending

Only 11 claims were filed to the courts. The main issues were considered in the court practice were (i) whether the association has a locus standi. The courts maintains a narrow interpretation of public interests taking into account that associations has a right to submit the claim only in the area of environmental protection and was not inclined to expand this area. The court has a notion that the area of public interests are described by the law, the competence stemmed from the law, therefore the competence area of the subject should be interpreted in the narrow way; (ii) how the term for the submission of complaint for the protection of public interests should be calculated. The interpretation that the calculation of term for submission of the complaint for the protection of public interests should be calculated from a date either when the claimant received sufficient data/information about the breach of public interests or when the data/information about the breach of public interests ought to be or might be collected, has prevailed. However, the court practice where the court decided that the term should be calculated taking into account the knowledge of the persons who is protected but not the knowledge of the person who submits the claim, existed as well.

## 9. Impact of the Recommendation/Problems and Critiques

Please see General Part.

## III. Information on Collective Redress

As it was mentioned, no national registry was created in Lithuanian legal system.

Information on collective claims is distributed in principle in two ways, either through the announcement published by the representative, or through the website dedicated to the group action. Naturally, the media may publish certain information about interesting cases at its own initiative.

## IV. Case summaries

<b>Case name</b>	<b>Keywords</b>
Court of Appeal of Lithuania, 2009-06-02, 2-492/2009	liability for damage - unlawful preliminary investigation - lack of regulation
<b>Reference</b>	<b>Summary of claims/Findings</b>
<b>Subject area</b>	Third parties Z. M. and B. G. filed a claim for declaration that officials conducting the preliminary investigation violated the public interest and inflicted damage for a large group of people. The court of Appeal of Lithuania stated that the law should provide a right for a person to defend the public interest. However, in this case the law does not provide the plaintiff with such right. Therefore, plaintiffs have a right to defend
<b>Dispute</b>	
General provisions	

<b>resolution method</b> Group action	<p>their infringed rights individually. Moreover, the law does not provide for the subjects that can bring a group action, what kind of action can be declared a group action, content requirements of a group action, <i>res judicata</i> effect of the judgment, the procedure of group action. Consequently, without additional legal regulation it is currently impossible to bring the group action in Lithuania.</p> <p><b>Outcomes</b></p> <p>Settlement: No</p> <p>Remedy: Damages were claimed however the case were not solved</p> <p>Amount of damages awarded: N/A</p> <p>Distribution of damages: N/A</p>
<b>Court or tribunal</b> Court	
<b>Cross-border character/ implications, if any</b> N/A	
<b>Opt-in/out</b> N/A	
<b>Type of funding</b> N/A	
<b>Costs</b> General principles applied.	
<b>Abusive litigation</b> No	

<b>Case name</b> Supreme Court of Lithuania, 2009-07-30, 3K-3-333/2009	<p><b>Keywords</b></p> <p>State Consumer Rights Protection Authority – legislation effect in time – protection of public interests</p> <p>Summary of claims/Findings</p> <p>The State Consumer Rights Protection Authority filed a claim against insurance company Ergo Lietuva seeking recognition of insurance rules as unfair and an amendment of them. Firstly, the Supreme Court of Lithuania recalled the existing jurisprudence concerning the protection of public interest by a prosecutor and stated that distinction should not be made in case where public interest is protected by the State Consumer. In both cases, the existence of public interest should be acknowledged by the court hearing the case. Secondly, the fact that during the proceedings, the insurance rules had already been amended annulled the existence of an infringement of the public interest. Moreover, the plaintiff did not prove the existence of any consumers which would be subject to an application of the initial insurance rules. For these two reasons the Court concluded that there was no public interest.</p>
<b>Reference</b>	
<b>Subject area</b> Consumer	
<b>Dispute resolution method</b> Protection of public interests.	
<b>Court or tribunal</b> Court	
<b>Cross-border</b>	



<b>character/ implications, if any</b> N/A	<p>Outcomes</p> <p>Settlement: No</p> <p>Remedy: N/A</p> <p>Amount of damages awarded: N/A</p> <p>Distribution of damages: N/A</p>
<b>Opt-in/out</b> N/A	
<b>Type of funding</b> N/A	
<b>Costs</b> General principles	
<b>Abusive litigation</b> [yes][no]	

<b>Case name</b> Vilnius District Court, 3-03-2017, e2S-770-431/2017	<p><b>Keywords</b></p> <p>State Consumer Rights Protection Authority – protection of public interests- involvement of third parties in the case</p> <p><b>Summary of claims/Findings</b></p> <p>The State Consumer Rights Protection Authority filed a claim against Auto City Group concerning recognition of the terms of a contract for renting a car unfair and void. The first instance court decided that the State Consumer Rights Protection Authority should involve all consumers as third parties in the case. The Vilnius district court ruled out the decision of first instance court and decided that it is no necessity for that because the State Consumer Rights Protection Authority initiated the case in the framework of control of unfair terms in abstracto.</p> <p><b>Outcomes</b></p> <p>Settlement: No</p> <p>Remedy: N/A</p> <p>Amount of damages awarded: N/A</p> <p>Distribution of damages: N/A</p>
<b>Reference</b>	
<b>Subject area</b> Consumer	
<b>Dispute resolution method</b> Public interest case	
<b>Court or tribunal</b> Court	
<b>Cross-border character/ implications, if any</b> N/A	
<b>Opt-in/out</b> N/A	

<b>Type of funding</b> N/A	
<b>Costs</b> General principles are applied	
<b>Abusive litigation</b> No	

<p><b>Case name</b> Supreme Administrative Court of Lithuania, 2013-10-15, A/146-585/2013 (very similar case Supreme Administrative Court of Lithuania, 2013-08-19, A/502-580/2013)</p> <p><b>Reference</b></p> <p><b>Subject area</b> Consumer.</p> <p><b>Dispute resolution method</b> Protection of Public interests case</p> <p><b>Court or tribunal</b> Court</p> <p><b>Cross-border character/ implications, if any</b> N/A</p> <p><b>Opt-in/out</b> N/A</p> <p><b>Type of funding</b> N/A</p>	<p><b>Keywords</b> Protection of public interests, locus standi of consumer association</p> <p><b>Summary of claims/Findings</b> The case were initiated concerning the contracts related to pensions funds and obligation of SODRA to pay additional money to the participants of the system of pensions funds. However, the essence of the court decision was decision on locus standi of the Association of the Participants of the Pensions Funds. Court decided that this association could not be considered as consumer association.</p> <p><b>Outcomes</b> Settlement: No Remedy: N/A Amount of damages awarded: N/A Distribution of damages:N/A</p>
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<b>Costs</b> General rules were applied.	
<b>Abusive litigation</b> No	

<b>Case name</b> Appeal Court of Lithuania, 2014-12-01, 2A-1461/2014	<b>Keywords</b> State Consumer Rights Protection Authority – consumer contract – unfair terms - nullity of contract terms
<b>Reference</b>	<b>Summary of claims/Findings</b> State Consumer Rights Protection Authority initiated the case against bank SNORAS concerning recognition of the contract terms as unfair terms and its nullity. The claim was satisfied.
<b>Subject area</b> Consumer	<b>Outcomes</b> Settlement: No Remedy: Injunction Amount of damages awarded: N/A Distribution of damages:N/A
<b>Dispute resolution method</b> Public interest protection	
<b>Court or tribunal</b> Court	
<b>Cross-border character/ implications, if any</b> N/A	
<b>Opt-in/out</b> N/A	
<b>Type of funding</b> N/A	
<b>Costs</b> General rules applied.	
<b>Abusive litigation</b> No.	

<b>Case name</b> Vilnius Regional Administrative Court,	<b>Keywords</b> Public interest, locus standi of association (association
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2015-12-23, 3-61-3-03631-2015-4	acting in environmental area)
<b>Reference</b>	<b>Summary of claims/Findings</b>
<b>Subject area</b> Environment	Association „Baldžio bendruomenė“ initiated case concerning obligation to dismantle equipment from the strand of the lake. The court decided that the community association does not act in the field of environmental protection, therefore has no locus standi in this case. The court environmental protection area interpreted as the area related to the environmental protection as described in the Law on Environmental Protection, territory planning and other issues on the landscaping.
<b>Dispute resolution method</b> Protection of public interest	<b>Outcomes</b>
<b>Court or tribunal</b> Court	Settlement: No Remedy: N/A Amount of damages awarded: N/A Distribution of damages: N/A
<b>Cross-border character/ implications, if any</b> N/A	
<b>Opt-in/out</b> N/A	
<b>Type of funding</b> N/A	
<b>Costs</b> General rules applied.	
<b>Abusive litigation</b> No.	

<b>Case name</b> Supreme Administrative Court of Lithuania, 2014-04-10, A/146-342/2014	<b>Keywords</b> Protection of public interests, locus standi of association, calculation of term for the submission of complaint, abusive litigation
<b>Reference</b>	<b>Summary of claims/Findings</b>
<b>Subject area</b> Environment	The prosecutor file the complaint to the administrative court taking into account the association Vėžaičių bendruomenė request concerning breach of public interests. Association Vėžaičių bendruomenė was involved in a case in status of third party. The essence of the complaint was to abolish the municipality decision concerning detail plan of the dump. The court considered in this case several important issues: (i) the locus standi of the

<p><b>Dispute resolution method</b></p> <p>Protection of public interests</p> <p><b>Court or tribunal</b></p> <p>Court</p>	<p>prosecutor and association Vėžaičių bendruomenė to file the complaint. The court decided that both subjects have locus standi in the case; (ii) the calculation of the term to file the complaint. The court referred to the administrative court practice addressing the issue on calculation of the term when the complaint is filed for the protection of public interests and considered that several elements are important: firstly when the claimant received sufficient data/information about the breach of public interests; secondly, when the data/information about the breach of public interests ought to be or might be collected. The court decided that term for the filing the complaint was overdue and noticed that in this case is very important circumstance that association Vėžaičių bendruomenė was fully aware that the term was overdue and did not provide the relevant information to the prosecutor. Therefore, association Vėžaičių bendruomenė by such behaviour abused its rights.</p>
<p><b>Cross-border character/ implications, if any</b></p> <p>N/A</p>	
<p><b>Opt-in/out</b></p> <p>N/A</p>	
<p><b>Type of funding</b></p> <p>N/A</p>	
<p><b>Costs</b></p> <p>General rules applied.</p>	<p>It should be noted that in case in the area of consumer protection the Supreme of Administrative Court of Lithuania (2008-06-03, A/143-910/2008) decided that the starting date for the calculation of term for provision of complaint should be calculated not taking into account the circumstances related to the claimant (association filing the claim for the purpose to protect public interests – consumer interests), but to the persons (consumers) for which interest the complaint is submitted.</p>
<p><b>Abusive litigation</b></p> <p>YES.</p>	<p><b>Outcomes</b></p> <p>Settlement: No</p> <p>Remedy: N/A</p> <p>Amount of damages awarded: N/A</p> <p>Distribution of damages: N/A</p>

<p><b>Case name</b></p> <p>Supreme Administrative Court of Lithuania, 2013-09-23, A/520-211/2013</p>	<p><b>Keywords</b></p> <p>Protection of public interests, locus standi of association</p> <p><b>Summary of claims/Findings</b></p> <p>Country community „Lumpėnų strazdas“ filed the complaint to the administrative court asking to abolish the decision of the municipality concerning</p>
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<b>Reference</b>	<p>detail territory plan. The court considered locus standi of the country community in this case. The court noticed two criteria which should be evaluated considering locus standi of the association in the field of environmental protection, i.e. firstly should be examined whether association is established pursuant to the laws, secondly, whether the association encourages environmental protection and helps to solve the landscaping issues. The court stressed that by evaluating the second criteria should be examined whether the association real acts in the environmental area and this activity was fulfilled in time of submission of the complaint. In this case the court decided that the country community did not prove that it really encouraged environmental protection and helped to solve the landscaping issues at time of submission of the complaint. The fact that country community after submission of the complaint has started to communicate with the institutions concerning the issues raised in the complaint is not sufficient to conclude about the real activity of the community in the area of environmental protection.</p> <p><b>Outcomes</b></p> <p>Settlement: No</p> <p>Remedy: N/A</p> <p>Amount of damages awarded: N/A</p> <p>Distribution of damages: N/A</p>
<b>Subject area</b> Environment	
<b>Dispute resolution method</b> Protection of public interests	
<b>Court or tribunal</b> Court	
<b>Cross-border character/ implications, if any</b> N/A	
<b>Opt-in/out</b> N/A	
<b>Type of funding</b> N/A	
<b>Costs</b> N/A	
<b>Abusive litigation</b> N/A	

<b>Case name</b> Supreme Court of Lithuania, 2013-01-16, 3K-3-112/2013	<b>Keywords</b> Protection of public interests, group action, locus standi of association
<b>Reference</b>	<b>Summary of claims/Findings</b> Claimants (several natural persons and several country communities (associations)) filed the claim to the general competence court by requiring to abolish the IPPC permit (Permit of Integrated Pollution Prevention and Control) and to declare the company activity unlawful and to oblige company to terminate its activity. The claim encompassed remedies of different nature – both administrative and civil. Taking into account that civil remedies prevail, the general competence court examined the case. The court inter alia considered the locus standi of the associations and the possibility to
<b>Subject area</b> Environment	
<b>Dispute resolution method</b> Protection of	

public interests <b>Court or tribunal</b> Court	<p>submit the claim taking into account that it is clear lack of rules for group action. The court declares the claimants locus standi considering international legal norms and requirements of European Union law. Moreover the court constituted that the fact that legal norms on group action mechanism are not elaborated in the laws cannot prevent the persons to apply for the protection of collective interests. The claim was satisfied.</p> <p><b>Outcomes</b></p> <p>Settlement: No</p> <p>Remedy: Injunction and declaration of the activity of the company unlawfull and obligation to terminate the activity.</p> <p>Amount of damages awarded: N/A</p> <p>Distribution of damages: N/A</p>
<b>Cross-border character/ implications, if any</b> N/A	
<b>Opt-in/out</b> N/A	
<b>Type of funding</b> N/A	
<b>Costs</b> General principles applied	
<b>Abusive litigation</b> No	

# LUXEMBOURG – FACTSHEET

## **Scope**

There is no specific horizontal class action mechanism.

Sectoral mechanisms are available in consumer and competition law.

Traditional devices for multi-party proceedings are available (joinder), as well as one specific type of representative action: duly qualified organisations can request the judicial review of an administrative decision issued by a public body.

## **Problems/Incompatibilities with Recommendation principles**

Collective redress mechanisms are limited to consumer and competition law, and are solely injunctive. The right to compensation and the right to access to justice remain theoretical for Luxembourg consumers.

## **Standing** (Para. 4-7)

An individual, professional group or accredited consumer association can bring the claim. The only entity authorised so far is the ULC (*'Union Luxembourgeoise des Consommateurs'*).

## **Admissibility** (Para. 8-9)

The Luxembourg group action follows a summary proceeding to obtain an injunction. It is a one stage process, and the cessation of the infringement may be ordered even in the absence of evidence of actual loss or damage, or negligence on the part of the defendant.

## **Information on Collective Redress** (Para. 10-12, 35-37)

The Court may order a publication of the decision: to be displayed outside the business facilities of the defendant, in newspapers, or by any other means. Costs to be borne by the defendant.

## **Problems/Incompatibilities with Recommendation principles**

No National Registry.

## **Funding** (Para. 14-16)

Currently, the only entity which has been allowed to file a group action is the ULC, which is financially assisted by the State.

## **Problems/Incompatibilities with Recommendation principles**

Third-party funding is unknown in Luxembourg. However no legal or regulatory provisions prohibits a third party from funding a claim.

## **Cross Border Cases** (Para. 17-18)

There are no specific rules or limitations as to the participation of foreign claimants.

## **Expedient procedures for injunctive orders** (Para. 19)

The Court can order any protective or interim measures to prevent a damage or put an end to a violation.

## **Efficient enforcement of injunctive orders** (Para. 20)



Any failure to comply with the injunctions or prohibitions imposed by a final decision shall be punishable by a fine (from 251 to 120 000 euros).

#### **Opt In/Opt Out** (Para. 21-24)

The organisation brings the claim in the general interest of the consumers, and does not represent a class of identified members. There is no mechanism of opting-in or out.

#### **Collective ADR and Settlements** (Para. 25-28)

The court can encourage the parties to settle, and the parties can chose to do so at any time.

#### **Problems/Incompatibilities with Recommendation principles**

No specific collective ADR mechanisms.

#### **Costs** (Para. 13)

The losing party usually does not bear the legal costs: each party bears its own. However, the successful party may recover a procedural indemnity from the losing party, the amount being determined by the judge.

#### **Lawyers' Fees** (Para. 29-30)

Contingency fees are prohibited. However, a lawyer and his client may enter into an agreement providing for a supplementary fee based on the result obtained.

#### **Prohibition of punitive damages** (Para. 31)

Luxembourg law does not allow damages to be punitive or exemplary.

#### **Collective Follow- on actions** (Para 33-34)

An injunction/sanction from the Luxembourg Competition Authority constitutes an irrefutable evidence of fault for the purpose of an individual action for compensation.

#### **Problems/Incompatibilities with Recommendation principles**

The follow-on compensatory action can only be individual.

#### **Interplay between injunctions and compensation across all sectors**

#### **Problems/Incompatibilities with Recommendation principles**

Group actions in Luxembourg cannot give rise to any compensation.

# LUXEMBOURG – REPORT

## I. General Collective Redress Mechanisms

Luxembourg law does not permit a horizontal collective redress mechanism other than the group actions laid out in Overview.

## II. Group Action in Consumer and Competition Law

### 1. Scope

Injunctive

A group action is available in Luxembourg law to request the cessation of any infringement of the Law of 30 July 2002 on unfair commercial and competition practices (*'loi sur les pratiques commerciales, concurrence déloyale, et publicité comparative'*).

### 2. Procedural Framework

#### a. Competent Court

The magistrate presiding over the chamber of the commercial district court (*tribunal d'arrondissement siégeant en matière commerciale*) is competent to order the cessation of the infringement (article 23 of the Law of 30 July 2002).

#### b. Standing

Article 23 of the Law of 30 July 2002 provides that an individual, professional group or accredited consumer association can bring the claim. A professional group is an association aiming to group individuals of the same profession (industrial, commercial, agricultural...) to defend the interests of the profession, and allow exchange between the members.

The only organisation that has so far been authorised to bring such action is the ULC (*'Union Luxembourgeoise des Consommateurs'*).

#### c. Availability of Cross Border collective redress

There are no specific rules or limitations as to the participation of foreign claimants.

#### d. Opt-In / Opt-Out

The organisation brings the claim in the general interest of the consumers, and does not represent a class of identified members. There is no mechanism of opting-in or out.

#### **e. Main Procedural Rules**

The action follows a summary procedure (*procédure de référé*) provided for in articles 932 to 940 NCPC: the Court can order any protective or interim measures to prevent a damage or put an end to a violation.

The cessation of the infringement may be ordered even in the absence of evidence of actual loss or damage, or negligence on the part of the defendant.

#### **Collective ADR and settlements:**

The court can encourage the parties to settle, and the parties can chose to do so at any time. In the majority of the cases, the defendant complied with the requests of the ULC, and the action was consequently terminated.

There is no specific collective ADR mechanisms. The law of 17 February 2016 introduced alternative dispute resolution for consumer disputes. However, it applies to "any national or cross-border dispute between one consumer and one professional concerning the contractual obligations arising from a contract of sale or service". It is thus not applicable in the case of a group action.

#### **Follow-on actions:**

An injunction/sanction from the Luxembourg Competition Authority constitutes an irrefutable evidence of fault for the purpose of an individual action for compensation. The follow-on compensatory action cannot be collective.

### **3. Available Remedies**

The aim of the claim can only be a cessation of the breach. It is not possible to claim damages on behalf of affected individuals.

### **4. Costs**

The losing party usually does not bear the legal costs: generally, each party bears its own. However, article 240 NCPC provides that the successful party may recover a procedural indemnity from the losing party, the amount being determined by the judge.

### **5. Lawyers' Fees**

Luxembourg Bar Article 2.4.5.3 prohibits contingency fees. However, a lawyer and his client may enter into an agreement providing for a maximum or minimum for a portion of the lawyer's fees, or a supplementary fee to be determined on the basis of the results obtained or services provided.

### **6. Funding**

Currently, the only entity which has been allowed to file a group action is the ULC, which is financially assisted by the State.

Third-party funding is unknown in Luxembourg. However, there are no legal or regulatory provisions prohibiting a third party from funding a claim.

## 7. Enforcement

Under article 25 of the Law of 30 July 2002, any failure to comply with the injunctions or prohibitions imposed by a final decision under article 23 shall be punishable by a fine (from 251 to 120 000 euros).

## 8. Cases

So far, only the ULC (*'Union Luxembourgeoise des Consommateurs'*) has been allowed to bring group actions under the 2002 Law on unfair business and competition practices. The ULC is only allowed to request injunctive relief, before the Luxembourg Competition Authority (*'Conseil de la Concurrence'*) for competition matters, and the District Court of Luxembourg for consumer matters.

<p>2012-FO-08 - Affaire <i>Union Luxembourgeoise des Consommateurs (ULC) v. assurances</i></p>	<p>Following a complaint lodged by the ULC on 21 September 2011, the Luxembourg Competition Authority initiated an investigation against insurance companies for alleged cartels.</p>	<p>By decision of 20 December 2012, the Competition Authority imposed a total fine of EUR 676 807 on nine insurance companies.</p>
<p><i>Union Luxembourgeoise des Consommateurs (ULC) v. Apple Distribution International</i></p>	<p>On October 10<sup>th</sup>, 2012, the ULC filed an action for cessation against Apple for misleading information in relation to the legal guarantee.</p>	<p>Following negotiations, Apple complied with the requests of the ULC, i.e. to properly inform buyers of their legal rights through information notice on the website and at the physical points of sale.</p> <p>By order of 12 July 2013, the District Court of Luxembourg terminated, at the request of the ULC, the action for cessation brought against Apple.</p>

## 9. Impact of the Recommendation / Problems and Critiques

The current group action mechanism in Luxembourg can only aim at putting an end to the infringement. In the absence of an effective collective redress mechanism, the right to compensation and the right to access to justice remain theoretical for Luxembourg consumers.

Both the ULC (*'Union Luxembourgeoise des Consommateurs'*) and the Bar Association of Luxembourg expressed the necessity to introduce a collective redress mechanism in Luxembourg law, in the area of consumer law in particular.

The Bar Association of Luxembourg demonstrated that without an effective collective redress mechanism, companies were technically able to maximize their profit through illegal practices, with an individual damage to the consumer “small” enough so as to discourage any legal action.

The ULC stated cases in telecommunications, insurance and transport where consumers could have been awarded damages if an efficient collective redress mechanism had been in place.

<p><i>Coditel (Numericable) case (Décision du Conseil de la Concurrence no 2012-AA-02 du 17 juillet 2012)</i></p>	<p>The telecommunication operator’s overbilling practices were condemned by the Luxembourg Competition Authority. However, individual compensation belongs to each contractual relationships between the subscribers and the operator and, as explained by the President of the Authority, it is likely that only a few subscribers will go to court to obtain compensation.</p>
<p><i>Transline Tour SARL case (pending)</i></p>	<p>Transline Tour SARL sold hundreds of plane tickets, cancelling them at the last minute because of an alleged bankruptcy. At least 50 customers reached out to the ULC to claim compensation, but the ULC was not allowed to represent them. The case is currently being prosecuted by the Parquet de Luxembourg before the criminal jurisdictions, but it is uncertain whether consumers will be compensated.</p>

In 2015, in response to a parliamentary question about the implementation of the 2013 Commission Recommendation, Ministers Fernand Etgen and Etienne Schneider noted that the government had undertaken to examine the possibility of introducing group actions to defend consumers' rights.

An opportunity for the implementation of a collective redress mechanism in competition law presented itself in 2016, with the enactment of the law transposing the Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law (*Loi du 5 décembre 2016 relative à certaines règles régissant les actions en dommages et intérêts pour les violations du droit de la concurrence des Etats Membres et de l'Union européenne*).

The Luxembourg Competition Council issued an opinion, agreeing with the bill but also expressing regret as to the absence of introduction of a collective redress mechanism in the bill, despite the fact that the Directive was accompanied by the 2013 Commission Recommendation.

In the area of competition law, the reluctance of economic actors to implement collective redress mechanisms, and the general “antitrust tendency” of the Luxembourg authorities (favouring protective agreements and dominant positions), could be explained by the small size of the country and its dependence upon other countries (Ashurst study, National report for Luxembourg).

To date, no further initiative has been taken.

## **10. Information on Collective Redress**

The Court may order a publication of the decision, to be displayed outside the business facilities of the defendant. It may also order the publication, in whole or by extract, by means of newspapers or by any other means. The costs are to be borne by the defendant.

There does not seem to be a National Registry keeping a record of the group actions in Luxembourg.

## **III. Other Sectoral Representative Actions**

### **1. Scope**

In Luxembourg administrative law, duly qualified organisations can request the judicial review of an administrative decision issued by a public body. The action is brought by the organization on behalf of all of its members, and can only aim at the annulment of an administrative decision.

### **2. Procedural Framework**

#### **a. Competent Court**

The Administrative Court decides on judicial review actions brought against administrative acts of a regulatory nature, irrespective of the authority from which they emanate.

#### **b. Standing**

The legal persons allowed to challenge an administrative act can be governed by public or private law (such as associations, trade unions and other groups formed to defend specific interests), provided that the action is brought to defend a distinctive corporate interest, and that its purpose is to benefit the collective interests of the organization as a whole (and not those of its individual members).

The claim can only be raised by a person with a direct and legitimate interest in the matter. As such, for instance, associations duly authorized under a specific law will be deemed to have standing if the administrative act is infringing upon this specific law.

#### **c. Main Procedural Rules**

The request must be made within three months of the publication of the contested administrative act or, in the absence of publication, of the day on which the claimant became aware of it.

The contentious proceedings are written. The claimant must be represented by a lawyer, except in tax matters.

Challenging an administrative act is non-suspensive, except for requests of international protection. However, the claimant can request a suspension of the contested act or protective measures from the President of the Administrative Court.

### 3. Available remedies

The action can only aim at the annulment of an administrative decision.

### 4. Costs

The unsuccessful party must pay court fees which, however, represent only a tiny part of the actual costs since each party must bear its own legal costs, irrespective of the outcome of the proceedings.

In certain cases, a party may claim legal aid. In this case, the State bears all costs (including legal fees).

### 5. Cases

The following representative entities have been deemed to have standing by the Council of State of Luxembourg (*Conseil d'État du Luxembourg*):

<i>C.E. 9 juillet 1969, 21, 113 - Ordre des Architectes</i>	The entity representing architects was able to bring a claim in defence of the organisation's collective interests, as determined by its corporate object set out in its articles of incorporation.
<i>C.E. 9 avril 1979, 25, 5 - Associations des Patrons-Mécaniciens-Dentistes</i>	The association of employers-mechanics-dentists was deemed to have sufficient standing to bring an action for the annulment of an administrative decision, which had put in jeopardy the collective interests of the association.
<i>C.E. 21 juin 1985 - Associations de protection de l'environnement</i>	The action of an association for the protection of nature and the environment against a ministerial decision allowing animal testing was deemed admissible.

### 6. Problems and Critiques

Although useful to defend the interests of professional groups, that type of representative action is very specific in its scope, and only allows for the challenge of a decision issued by a public body. The action is thus not relevant for infringements perpetuated by an entity other than a public body, and also cannot result in compensation.

# MALTA – FACTSHEET

## Scope

Two horizontal mechanisms available:

- (a) Collective Action
- (b) Collective Proceedings action

Both mechanisms allow for **injunctive and compensatory** relief.

## Standing (Para. 4-7)

### Collective Proceedings

A distinction is made between a representative action (brought by a registered consumer association or an *ad-hoc* constituted body on behalf of class members) and a group action (brought by a class representative on behalf of class members).

Consumer association or an *ad-hoc* constituted body needs to show that there is no material interest that is in conflict with the interests of the class members. A class representative (not being a registered consumer association) must have also have a claim which falls within the proposed collective proceedings, is expected to act fairly and adequately act in the interests of the class members; and must not have, in relation to the common issues for the class members, a material interest that is in conflict with the interests of the class members.

### **Problems/Incompatibilities with Recommendation principles**

Public authorities are not empowered to bring representative actions.

In the case of a representative action brought forward by a registered consumer association, there are no requirements as to its sufficient capacity (financial resources, human resources and legal expertise) to properly represent the class members in their best interests.

## Admissibility (Para. 8-9)

Court determines of its own motion whether the statutory eligibility requirements have been met.

## Information on Collective Redress (Para. 10-12, 35-37)

Decree of group constitution and issues is to be published in the Government Gazette and in a local English and Maltese newspaper and in any other media with an invitation to any other third parties who wish to be class members must indicate their intention to do so within roughly 5 months from the date of the decree.

### **Problems/Incompatibilities with Recommendation principles**

No national registry. Absence of proper framework for dissemination of information

## Funding (Para. 14-16)

No provisions on third party litigation funding. Champetry is not allowed.

### **Problems/Incompatibilities with Recommendation principles**

No framework for the provision of funding. Law falls short of the Recommendation, in particular points 14, 15, 16 and 32. No specific rules on whether court is allowed to stay proceedings if the instances outlined in para. 15 of the Recommendation exists.

## Cross Border Cases (Para. 17-18)



National rules on admissibility or standing facilitate foreign claimant or foreign representative entity involvement.

#### **Expedient procedures for injunctive orders** (Para. 19)

Interim injunctive order possible. The court is required at law to deliver the judgment on whether the warrant is to be upheld permanently within 1 month from the date the application for injunction was filed.

#### **Efficient enforcement of injunctive orders** (Para. 20)

A warrant for a prohibitory injunction is deemed to be a court order. Breach of such order is a criminal offence.

#### **Opt In/Opt Out** (Para. 21-24)

Opt-in by express consent and requirement of collective proceedings agreement. Conditions prescribed by law, supplemented by discretion of the judge.

Class member who does not opt-in by the time period laid down in decree, may only opt in with special leave from the court if the delay was not attributable to the applicant and the continuation of the proceedings would not suffer substantial prejudice if permission were granted.

#### **Problems/Incompatibilities with Recommendation principles**

Likely that class member can opt-out if he or she is permitted to do so in terms of the collective proceedings agreement. The right of a class member to opt-out at any stage during the collective proceedings should be introduced in the Act, naturally subject to certain conditions on sharing of costs and other pertinent issues.

#### **Collective ADR and Settlements** (Para. 25-28)

A class representative may only reach a compromise with the defendant/s with the permission of the court. The court will require the class representative to inform the court on how he intends to notify the class members and on the terms of the proposed compromise. In line with the opt-in principle, any class member may, with the permission of the court, be omitted from the compromise. Court approves compromise.

#### **Costs** (Para. 13)

Loser Pays Principle applies. Possible penalty of €2,500 imposed where court finds that the collective proceedings were frivolous or vexatious

#### **Lawyers' Fees** (Para. 29-30)

Advocates are not allowed to agree to a stipulation quotae litis. Fees are to be in line with a tariff established by law

#### **Prohibition of punitive damages** (Para. 31)

Punitive damages not allowed. The damages which may be claimed are either patrimonial, which refer to losses suffered directly by the claimant's patrimony or estate, whether past, present or future, or non-patrimonial, which refer to moral anguish and pain and suffering.

#### **Collective Follow- on actions** (Para 33-34)

Collective follow-on actions possible in competition law

#### **Interplay between injunctions and compensation across all sectors**

Injunctive and compensatory relief may be sought within single proceedings. At present in consumer and competition cases. Follow-on damages actions may rely on injunctions order.



# Malta - Report

## I. General Collective Redress Mechanism

### 1. Scope/ Type

There are two types of collective action: (a) A rudimentary form where two or more plaintiffs bring one application, and (b) Collective Proceedings action

#### a. Collective Action

Maltese procedural law has at least since 1985 allowed a Collective Action. This is in terms of Article 161(3) of the Code of Organisation and Civil Procedure. In a Collective Action, two or more plaintiffs are allowed to bring their actions by means of one application (rather than separate), if:

- the actions are connected in respect of the subject matter thereof; or
- the decision of one of the actions might affect the decision of the other action or actions and the evidence in support of one action is, generally, the same to be produced in the other action or actions.

This applies for both injunctive and compensation relief and applies to any action which may be brought before the Maltese courts and tribunals.<sup>547</sup>

It must be said that this provision of the law has not been interpreted restrictively by the Maltese courts<sup>548</sup> and the same courts have recognised its importance to reduce the amount of litigation and also to empower the plaintiffs by reducing costs and inconsistent judgments.<sup>549</sup> There are a couple of significant cases which allowed more than 2 applicants to file their actions by way of one application:

- approximately 18,000 claimants were allowed to bring a case in 2009 against the Government of Malta for the refund of VAT paid on imported cars within the internal market (the "**VAT case**"). The campaign was promoted by the Malta Labour Party (who was at the time in opposition and since 2013 was elected to govern) through various newspapers, TV stations and social media pages. The case was eventually dropped after the Government of Malta launched a scheme to refund VAT paid;
- 25 claimants were allowed to bring a constitutional case in 2013 to challenge an alleged case of discrimination on the basis of nationality/residency by the national utility company (*Patricia Graham v Advocate General* Application No. 19/2013: judgment expected to be delivered on 27 June 2017) (the "**ARMS case**"). The case was strongly promoted on social media pages (specifically Facebook) and also on newspapers. Although 80 claimants initially showed interest, the amount

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<sup>547</sup> We are also assisting a Malta-based gaming company in connection with voluntary arbitration proceedings filed by their distributors in Malta by relying on this provision of the Code of Organisation and Civil Procedure.

<sup>548</sup> *Joseph Micallef et v Trusted Limited et*, First Hall Civil Court (20 June 2012); *Jonathan Ellul et v Jesmond Mercieca et*, First Hall Civil Court (14 April 2016); *C&M Contractors Ltd et v Attard Elasrag Co Limited*, First Hall Civil Court (5 October 2016). A notable exception where the test was applied, in our view, rigidly is *Robert Hughes et v Permanent Secretary, Ministry for Finance, Economy and Investment*, Administrative Review Tribunal (17 November 2014).

<sup>549</sup> *Mary Vella et v Josephine Bugeja*, First Hall Civil Court (4 June 1991).

of claimants dwindled to 25 when the lawsuit was actually filed. The case is still pending; and

- 138 claimants were being assisted by the Malta Consumer Rights Association and the University of Malta on the possibility to bring a lawsuit against a travel package provider which ran into bankruptcy (the "**Fantasy Tours case**"). The claimants filed an initial pre-litigation judicial letter in the Maltese courts with a view to file an application under the Act in case of non-payment. The claimants eventually never filed the application for collective proceedings after the Government of Malta launched a refund scheme.

There are other areas of the law where collective proceedings are encouraged and allowed, in particular, employment law related disputes, but again this is allowed under Article 161 of the Code of Organisation and Civil Procedure. Nevertheless, the legislator must have felt that a robust and structured legislative framework had to be introduced for collective proceedings.

## **b. Collective Proceedings**

In 2012, the Maltese Parliament passed the Collective Proceedings Act (Chapter 520 of the Laws of Malta) which provides for a collective redress mechanism. The Act is solely limited to actions asking for the cessation of an infringement, or the rectification of the consequences of an infringement and, or compensation for harm where:

- an infringement of the Consumer Affairs Act (Chapter 378 of the Laws of Malta), Product Safety Act (Chapter 427 of the Laws of Malta) and the Competition Act (Chapter 379 of the Laws of Malta);
- an investigation before a public authority or proceedings before a tribunal or similar body or court of civil jurisdiction concerning an infringement of the laws mentioned in the first sub-indent is or are still pending; or
- a decision or judgement establishing a breach of the said laws in relation to the same facts has become *res judicata*.

It must be said that the intention of the Minister responsible for pushing through the Act was clearly to extend the scope of the Act to other sectors and industries, however, this never materialised.<sup>550</sup> It must also be said that the Act remains largely untested and the Maltese courts only dealt with a handful of applications filed under the Act.

The focus of the Malta report will be exclusively on the Act and it will not deal with the collective action allowed under Article 161(3) of the Code of Organisation and Civil Procedure.

## **2. Procedural Framework**

### **a. Competent Court**

Any collective proceedings must be filed before the First Hall Civil Court (Malta) or the Court of Magistrates (Gozo) Superior Jurisdiction depending on the domicile of the defendant irrespective of the amount claim (in the case of compensative relief). The application must be confirmed on oath by the class representative.

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<sup>550</sup> Juan Ameen, 'Class action law for business will be given wider scope' (Times of Malta, 29 September 2011) <http://www.timesofmalta.com/articles/view/20110929/local/Class-action-law-for-business-will-be-given-wider-scope.386865>.

## **b. Standing**

Collective proceedings may either be brought on behalf of a class of members by a registered consumer association/*ad-hoc* constituted body or by a class representative. The Act makes the distinction between a representative action (brought by a registered consumer association or an *ad-hoc* constituted body on behalf of class members) and a group action (brought by a class representative on behalf of class members). Public authorities are not empowered to bring representative actions.

The courts are required to “approve” of the class representative if the eligibility criteria in the Act are satisfied. A registered consumer association or an *ad-hoc* constituted body is expected to act fairly and adequately in the interests of the class members and that it does not have, in relation to the common issues for the class members, a material interest that is in conflict with the interests of the class members. Moreover, a registered consumer association can only bring a representative action on behalf of class members who satisfy the definition of “consumer” at law.

A class representative (not being a registered consumer association):

- must have also have a claim which falls within the proposed collective proceedings;
- is expected to act fairly and adequately act in the interests of the class members; and
- must not have, in relation to the common issues for the class members, a material interest that is in conflict with the interests of the class members.

The court hearing the collective proceedings may at any stage order the substitution of the class representative if the eligibility criteria indicated above are no longer satisfied by that person.

## **c. Availability of Cross Border collective redress**

Any collective proceedings which are filed in Malta must satisfy the jurisdictional tests provided for by law. If the defendant is domiciled in Malta or in an EU Member State, then the Brussels I bis Regulations will apply,<sup>551</sup> while if the defendant is domiciled in a third country the Code of Organisation and Civil Procedure will apply.<sup>552</sup> The Maltese courts are definitely seised with jurisdiction to hear collective proceedings brought against any legal or natural persons domiciled in Malta.<sup>553</sup> It is also possible in certain cases for a class of consumers exclusively domiciled in Malta to bring collective proceedings in Malta against a defendant domiciled in another EU Member States.<sup>554</sup>

In the case of collective proceedings against a Maltese defendant, it is certainly possible for the class representative and for the class members to be foreign, and therefore, not domiciled or habitually resident in Malta. As far as we are aware, there are no national rules on admissibility or standing which would act as a barrier for such cases. As a matter of fact, the definition of a “registered consumer association” (which can act as a class representative) is

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<sup>551</sup> Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)

<sup>552</sup> Code of Organisation and Civil Procedure, Article 742

<sup>553</sup> Regulation 1215/2012, Article 4.

<sup>554</sup> *ibid.*, Article 17.

wide enough to taken into account “any other consumer association that has been officially recognised in any other country”.

#### **d. Opt In/ Opt Out**

The Act adopts an opt-in system. Any member of the class needs to be part of a collective proceedings agreement, and therefore, each member must opt-in by express consent. The class representative must then provide the court with a collective proceedings agreement to which each class member should be a party.

After the application is filed by the class representative a pre-trial hearing will be scheduled by the court. In this pre-trial hearing the court has to decide whether it will decree the continuation of the collective proceedings if the requirements at law are satisfied. The court shall then order that such decree is to be published in the Government Gazette and in a local English and Maltese newspaper and in any other media with an invitation to any other third parties who wish to be class members must indicate their intention to do so within roughly 5 months from the date of the decree. This requires the third party to register his or her claim with the class representative and entering into a collective proceedings agreement.

If a potential class member does not opt-in by the time period laid down in this decree, he may only do so with special leave from the court in case only if the delay was not attributable to the applicant and the continuation of the proceedings would not suffer substantial prejudice if permission were granted.

The Act is silent on whether a class member can opt-out at any stage during the proceedings. We would take the view that any class member can opt-out if he or she is permitted to do so in terms of the collective proceedings agreement. The collective proceedings agreements we have seen (which were submitted in two cases brought under the Act) did not contain any terms on opt-out.

The class representative shall keep a register of all the class members (identity and claim) and is required to provide the defendant with a copy of such register to the defendant/s.

#### **e. Main procedural rules**

The procedure under the Act is structured in multi-stages which include a pre-trial hearing to determine whether proceedings can continue as collective proceedings, the possibility of having sub-classes of claims as well as the hearing of individual issues separately. We will explain in brief each stage.

**Pre-Trial Hearing:** Following the filing of the application for collective proceedings, the court will schedule a pre-trial hearing where it will either issue a decree ordering the continuation of the proceedings together or the stay of the proceedings if the parties agree, during the hearing, to attempt to compromise the lawsuit by alternative dispute resolution or other means.<sup>555</sup>

The court must be satisfied that 3 requisites are present in order to decree the continuation of proceedings<sup>556</sup> Firstly, the collective proceedings must be appropriate. Secondly, the class representative is eligible to act as such (as explained in more detail above under b. Standing). Thirdly, the claims put forward in the application fall within the scope of the Act (as explained more

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<sup>555</sup> Act, Article 6.

<sup>556</sup> Act, Article 7.

detail above under 1. Scope). If any one of the 3 requisites are not present, the court must dismiss the act and order that the collective proceedings are discontinued. This assessment is required at law, and therefore, it is carried out on the court's own motion. A right of appeal lies from this decision.

The collective proceedings are deemed appropriate where those proceedings:

- are brought on behalf of an identified class of two or more persons;
- raise common issues;<sup>557</sup> and
- are the most appropriate means for the fair and efficient resolution of the common issues, in particular, by taking into account the benefits of the proposed collective proceedings and the nature of the class.

**Decree ordering Continuation of Proceedings:** The decree issued by the court must include the following details:

- the name and address of the class representative;
- the name of the defendant;
- a description of the class;
- the common issues for the claims which the class representative has brought in the collective proceedings;
- the claims sought; and
- information on the legal effect of a judgment in the collective proceedings:

This decree will be published by way of a notice in the Government Gazette, in a local English and Maltese newspaper and also in any other media. This notice will also include an invitation for third parties to opt-in in the collective proceedings.

**Stages of Collective Proceedings:** In principle, common issues for a class and sub-class will be determined together, while individual issues will be determined in further and separate hearings. The applicable rules on the burden of proof depend on the claim brought by the class members, but in principle, it is for the claimant to make his or her case before the courts. Under Maltese law, there is no duty of disclosure of documents within a context of discovery phase, but in claims for damages for anti-competitive behavior there are wider remedies for the disclosure of documents.

**Judgments and Decrees:** The court has the discretion to deliver separate judgments in respect of class common issues, sub-class common issues and individual issues. The court may also, on the application either party or even a class member, issue decrees with respect to the conduct of collective proceedings to ensure its fair and expeditious determination.

**Compromise/Settlements:** A class representative may only reach a compromise with the defendant/s or discontinue all or part of a claim in collective proceedings with the permission of the court. The court will require the class representative to inform the court on how he intends to notify the class members and on the terms of the proposed compromise. In line with the opt-in principle, any class member may, with the permission of the court, be omitted from the compromise. A compromise approved by the court binds every class member, except those who have been omitted after applying to the court or notifying the class representative directly. If one or more of the

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<sup>557</sup> "Common issues" are defined as common but not necessarily identical issues of fact, or common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

class members are to be omitted from the compromise, the court shall give directions for the future conduct of the proceedings.

### **3. Available Remedies**

The Act expressly provides that collective proceedings may be filed to seek the cessation of an infringement, the rectification of the consequences of an infringement and, or compensation for harm. The remedy emerges from the actual provisions of the Consumer Affairs Act, Competition Act and Product Safety Act. In principle, however, the following points apply across the board to all three:

**Interim measures:** Under Maltese civil procedural law it is possible to obtain pre-trial attachment. There are various types of warrants available, including:

- Warrant of description. Following an application for a warrant of description, a Maltese court may order a court official to draw up an inventory describing in detail the things forming the subject matter of the warrant (which must be movables and tangible in nature, and include bearer securities) by stating their quantity and quality. The Maltese Courts may also order that the things forming the subject matter of the warrant remain in the custody of the person in whose possession they are found;
- Warrant of seizure of movables. This warrant of seizure orders the removal of property of the debtor, which is subsequently seized under court authority with a view for it to be sold by means of a court approved public auction (i.e. after an executive title is obtained such as a judgment on the merits);
- Warrant of seizure of a commercial going concern. A warrant of seizure of a commercial going concern is issued to preserve the totality of the assets of the going concern by ordering that those assets are not sold in part or in whole and are to be concurrently kept in business;
- Garnishee order. A garnishee order would require that moneys or movable property held by third parties for a debtor are attached and deposited in court;
- Warrant of prohibitory injunction. An application for a warrant of prohibitory injunction must demand that a person is restrained from doing (both acts and omissions are included) anything which might be prejudicial to the person filing the application. Any such application is generally always provisionally upheld by the court once filed, but then within a short period of time a hearing is scheduled for both parties to exchange evidence and legal submissions on whether the application should be upheld on a permanent basis (which then requires the filing of a lawsuit within 20 days). The court is required at law to deliver the judgment on whether the warrant is to be upheld permanently within 1 month from the date the application was filed; and
- Warrant of arrest of sea vessels / aircraft. Such warrants order that the sea vessel or aircraft in question is seized and attached under the control and power of the Authority for Transport in Malta.

The precautionary warrants mentioned above may only be issued if the essential requisites particular to each warrant are satisfied and each warrant is subject to any procedural formalities or exceptions provided by law.

It is not clear whether a class representative is in a position to demand the issue of such precautionary warrants, but it is likely that the adverse parties



affected by such warrants would attempt to challenge the issue of the warrant by attacking the appropriateness of the collective proceedings. There are a couple of cases where more than two parties collectively file for a warrant of prohibitory injunction (injunctive order). A good example would be *Simon Camilleri et v Mapfre Middlesea et* where over 90 tradesman demanded an injunctive order against 4 insurers based in Malta from applying a system of technical certification.<sup>558</sup> Although the demand was not upheld on the merits, neither the defendants nor the court raised the issue of whether 90 tradesmen could have filed for the injunctive order on the basis of lack of commonality. It is likely that the injunctive order was filed (as has happened in other cases) on the basis Article 161 (3) of the Code of Organisation and Civil Procedure.

**Damages:** Damages which may be awarded under Maltese law are restorative in nature intended at placing, to the extent possible, the injured party to situation which would have prevailed if the harm was not suffered. The so-called *status quo ante*. No punitive damages may be awarded and it is considered against Maltese public policy to do so. The damages which may be claimed are either patrimonial, which refer to losses suffered directly by the claimant's patrimony or estate, whether past, present or future, or non-patrimonial, which refer to moral anguish and pain and suffering.

**Limitation periods:** The applicable limitation period is that provided for the law applicable to the dispute. The Act does provide that the limitation period will be "interrupted" in favour of a class member on the commencement of the collective proceedings, but that interruption will not apply if the class member withdraws from the collective proceedings.<sup>559</sup> It is not clear what the meaning of "interruption" is here. The Civil Code provides that an "interruption" of a limitation period means that it will start to run afresh, but usually the filing of a lawsuit will "suspend" a limitation period rather than "interrupt" meaning that it will stop running until a final and definitive judgment is delivered. It is likely that within the context the legislator wanted to attribute the meaning of "suspension" to "interruption" used in the drafting of this provision.

#### 4. Costs

The Act embraces the loser pays principle as applied in Maltese civil procedural law. There are exceptions to this principle, in particular, registered consumer associations are exempted from the payment of the fees due to the court registry and the judicial costs may be shared amongst the parties to the lawsuit where a novel point of law was dealt with.

The judicial costs are composed of three different components:

- costs due to the court registry upon filing of an application and further judicial acts;
- fees due to the advocate; and
- fees due to the legal procurator.

All three components are calculated according to a tariff established by law which is proportionate with the estimated value of the dispute. In practice, the fees due to the advocate and to the legal procurator do not always cover

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<sup>558</sup> First Hall Civil Court (28 April 2017) [Ref: 430/2017/1].

<sup>559</sup> Act, Article 22.

the professional legal fees agreed between the advocate and the client. This is particularly so in the cases of disputes with a low estimated value or disputes which are for injunctive relief (rather than for compensation) since the tariff establishes an amount of fees which does not necessarily represent the work required by the advocate to represent his client.

The judicial costs will be awarded in favour or against the class or sub-class representative—the class members are not imputed any costs.

Interestingly, the Maltese courts may add up a “penalty” of €2,500 where it finds that the collective proceedings were frivolous or vexatious.

## **5. Lawyers’ Fees**

Advocates admitted to the Maltese bar usually charge in line with a tariff established by law according to the value of the dispute or by way of hourly rates or fixed/capped fees as agreed with client. Champetry is not allowed under Maltese law—advocates are not allowed to agree to a stipulation *quotae litis* and such stipulations are deemed unenforceable.<sup>560</sup>

## **6. Funding**

There are no provisions in the Act on third party litigation funding in the case of collective proceedings, but we are not aware of any national provisions which would prohibit it. Having said that, the Act provides no framework for the provision of funding and in that respect it falls short of the Recommendation, in particular points 14, 15, 16 and 32. Third party litigation funding is not customarily resorted to by Maltese litigants across all sectors and industries. We are aware that some third party litigation funding institutions are based in Malta, but they mostly operate overseas within the internal market.

## **7. Enforcement of collective actions/settlements**

The enforcement of foreign collective actions/settlements in Malta is only possibly if in case of an EU/EEA decree/judgment it falls within the Brussels I bis Regulation and in the case of third countries only if it is a final and definitive judgment (not an order or decree).

## **8. Number and types of cases brought/pending**

We are only aware of 1 pending case and 1 settled case filed under the Act.

## **9. Impact of the Recommendation/Problems and Critiques**

It does not appear that the Act has been used since its introduction other than 2 reported cases. It may well be that the reluctance to pursue class actions by stakeholders in Malta is attributable to cultural issues. It is our view, however, that the absence of proper education on the Act and the opportunities it presents is at root of this “reluctance”. As the VAT and

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<sup>560</sup> Code of Organisation and Civil Procedure, Article 83; Civil Code, Article 986.

Fantasy Tours cases have shown, the right education campaign can be crucial to gather sufficient interest to push ahead with collective proceedings.

It is a pity that the Act has not been properly tested so far, and therefore, it is difficult to assess what its weakness may be. Having said that, the Act, which was enacted in August 2012, may certainly be improved in certain respects. Firstly, its scope should be widened to cover other breaches of the law. Secondly, a number of the points put forward by the Recommendation can be endorsed. These are the following:

**Standing:** In the case of a representative action brought forward by a registered consumer association, there are no requirements as to its sufficient capacity (financial resources, human resources and legal expertise) to properly represent the class members in their best interests. Indeed, the Act does indicate that the court must see that the class representative will act in the class members' best interests and must fairly and adequately represent them—but this might have been drafted too widely. Public authorities should also be empowered to bring representative actions, but certain public authorities who can also exercise executive powers against traders, in particular, the Malta Competition and Consumer Affairs Authority, should not, in our view, be empowered to do so as there might be conflict of interest issues.

**Funding:** As highlighted above, there is no framework regulating third party litigation funding of collective proceedings in the Act. Although it is not customary to resort to third party litigation funding in Malta, a light-touch framework should be in place to avoid abuse.

**Opt-In:** The right of a class member to opt-out at any stage during the collective proceedings should be introduced in the Act, naturally subject to certain conditions on sharing of costs and other pertinent issues. The Act should also establish a black-list of unfair terms which should not be included in the collective proceedings, in particular, those which may be too onerous for any class member wishing to opt-out.

**Limitation Period:** The legislator should clarify that the term "interrupted" is meant to mean "suspended" in line with point 27 of the Recommendation.

**Registry of Collective Redress Actions / Information on Collective Redress Actions:** A proper framework should be set up in connection with these points.

## **II. Sectoral Collective Redress Mechanism(s)**

N/A

## **III. Information on Collective Redress**

There is no comprehensive registry of collective redress actions in Malta. There are no clearly established channels for dissemination of information on collective claims. We observe that there is clearly a lack of education on the institute of collective proceedings introduced by the Act both in consumers

and potential claimants, but more importantly in legal professionals who are meant to advise consumers and claimants.

In the past we have observed that social media pages (such as Facebook) and adverts on daily newspapers circulated in Malta were utilised to attract plaintiffs willing to join an action.

#### IV. Case summaries

<p><b>Case name:</b> Malta Consumer Association noe v Global Capital Financial Management Limited</p> <p><b>Reference:</b> 122/2012</p> <p><b>Subject area:</b> consumer/financial services/investment services</p>	<p><b>Keywords</b></p> <p>competence / privilegium fori</p> <p><b>Summary of claims</b></p> <p>The claim was brought before the Court of Magistrates (Gozo) Superior Jurisdiction on behalf of 4 class members on the basis that the service provider committed unfair commercial practices under the Consumer Affairs Act in the provision of investment products. The court did not deal with the preliminary pleas raised by the service provider on the collective proceedings, but focused on the first preliminary plea that the application should have been filed in Malta not in Gozo. The court threw out this preliminary plea in a judgment which was then appealed. The parties then settled the case and the collective proceedings were dropped.</p>
<p><b>Dispute resolution method</b></p> <p>Representative action</p> <p><b>Court or tribunal:</b> Court of Magistrates (Gozo) Superior Jurisdiction / Court of Appeal</p>	<p><b>Findings</b></p> <p>Nothing particularly relevant other than a preliminary judgment on whether the Gozo Courts were competent to hear the case</p>
<p><b>Cross-border character/ implications, if any:</b> No</p>	<p><b>Outcomes</b></p> <p>Settlement: Yes, but the settlement agreement was not submitted for the Court`s approval</p> <p>Remedy: Damages</p>
<p><b>Opt-in/out</b></p> <p>Opt-in</p>	<p>Amount of damages awarded: N/A, but the amount demanded was roughly €40,000</p> <p>Distribution of damages: N/A</p>
<p><b>Type of funding</b></p> <p>None were disclosed</p>	<p>Amount of damages awarded: N/A, but the amount demanded was roughly €40,000</p> <p>Distribution of damages: N/A</p>

<b>Costs</b> Shared	
<b>Abusive litigation</b> No	

<p><b>Case name:</b> Malta Consumer Association noe v Global Capital Financial Management Limited</p> <p><b>Reference:</b> 85/2015</p> <p><b>Subject area:</b> consumer/financial services/investment services</p>	<p><b>Keywords</b> Standing / Admissibility</p> <p><b>Summary of claims</b> The claim was brought before the Court of Magistrates (Gozo) Superior Jurisdiction on behalf of 3 class members on the basis that the service provider committed unfair commercial practices under the Consumer Affairs Act in the provision of investment products. The court has not deal with the preliminary pleas raised by the service provider on the collective proceedings yet, but focused on the first preliminary plea that the application should have been filed in Malta not in Gozo. The court upheld this preliminary plea and the case has now been transferred to the courts in Malta. The case is still ongoing and now the court is hearing evidence on whether the requirements of the Act have been satisfied</p>
<p><b>Dispute resolution method</b> Representative action</p> <p><b>Court or tribunal:</b> Court of Magistrates (Gozo) Superior Jurisdiction / First Hall Civil Court</p>	<p><b>Findings</b> Nothing particularly relevant other than a preliminary judgment on whether the Gozo Courts were competent to hear the case</p>
<p><b>Cross-border character/ implications, if any:</b> No</p>	
<p><b>Opt-in/out</b> Opt-in</p>	<p><b>Outcomes</b> Settlement: N/A Remedy: Damages</p>
<p><b>Type of funding</b> None were disclosed</p>	<p>Amount of damages awarded: N/A but the amount demanded is roughly €150,000 Distribution of damages: N/A</p>
<p><b>Costs</b></p>	

N/A	
<b>Abusive litigation</b> No	

# THE NETHERLANDS – FACTSHEET

## **Scope**

The Dutch system provides for three types of horizontal collective redress mechanisms:

- Collective Settlements of Mass Claims Acts (WCAM)
- Collective action, on the basis of articles 3:305a-305d Dutch Civil Code (solely injunctive/declaratory)
- Action on the basis of mandate/power of attorney and/or transfer/assignment of claims to a special purpose vehicle (compensatory and injunctive)

## **Standing** (Para. 4-7)

Only non-profit entities, either ad hoc or pre-existing, that meet certain criteria, can act in collective actions or conclude collective settlements.

### **Collective Action**

Interests have to be sufficiently alike in order to be bundled for efficient and effective legal protection.

### **WCAM**

Only the party or parties compensating the damages or contributing to the settlement fund and an entity representing the victims will conclude a settlement agreement.

### **SPV**

No need to be non-profit. Standing derives from the standing of the claimants represented, which means that (a) the claimant itself must previously have had standing as being directly harmed, and (b) the claimant must be properly represented, i.e. the entity must have a valid mandate to act in the name of the claimant, or the claim must have been transferred to the entity.

The entities must have the goal of protecting the concerned interests.

### **Problems/Incompatibilities with Recommendation principles**

In a collective action, the court does not check whether the claim sufficiently protects the interests of the persons concerned. Concerns that this leaves room for some entities to bring claims out of a purely financially driven motive.

The requirement that the entities prove to the court that they have the administrative and financial capacity to bring a claim is part of a recent Bill making its way through the Dutch Parliament on collective damages actions

## **Admissibility** (Para. 8-9)

In all three mechanisms, the legal capacity of the entities will be checked, as well as their purpose to protect specific interests in their articles of associations. The WCAM procedure is a settlement that the parties reach out of court, and then submit to the court. The court will only consider if the compensation is "reasonable" to make it binding.

## **Information on Collective Redress** (Para. 10-12, 35-37)

### **WCAM**

Publication in newspapers, websites, individual letters, bailiff notifications, etc.

### **Problems/Incompatibilities with Recommendation principles**

No data on the number of actions launched on the basis of mandate and/or transfer of claims.

National Registry not available

#### **Funding** (Para. 14-16)

In collective actions funding is often obtained via contributions from individuals whose interests are at stake or who have an idealistic purpose in supporting the organisation. Actions on the basis of mandate and or/transfer of claims are typically financed via individual contracts by the claimants with the special purpose vehicle. The contract often stipulates that claimants will receive the award minus a percentage. Increasingly, ad hoc entities receive third party funding from commercial litigation funders or legal expense insurers.

#### **Problems/Incompatibilities with Recommendation principles**

Third party funding is allowed and currently unregulated.

#### **Cross Border Cases** (Para. 17-18)

##### **Collective Action**

No limitation regarding nationality; foreign plaintiffs can make use of the Dutch collective action as long as the articles of association of the respective organization cover the scope of the action and include the interests of the foreign parties.

##### **WCAM**

A foreign representative organisation can participate in the WCAM procedure, as long as it has full legal capacity to act in court.

##### **SPV**

Foreign plaintiffs can participate on the same basis as Dutch plaintiffs in actions on the basis of mandate and/or transfer of claims if the law governing the mandate or transfer allows it, and the mandate or transfer is valid.

#### **Problems/Incompatibilities with Recommendation principles**

The WCAM procedure operates on an opt-out basis and every member included in the settlement who does not opt-out in time is bound by that settlement, including foreign parties. It has been untested so far whether such a settlement would be recognised and enforced in jurisdictions that view the opt-out device as problematic.

#### **Expedient procedures for injunctive orders** (Para. 19)

Expedient injunctive orders via Kort Geding procedure

#### **Efficient enforcement of injunctive orders** (Para. 20)

Ordinary monetary fines are available.

#### **Opt In/Opt Out** (Para. 21-24)

##### **WCAM**

Procedure operates on an opt-out basis. The class must be clearly defined in the settlement agreement. After court approval, the settlement has a binding effect on all victims included in the terms of the settlement, except for those who have declared their wish to opt-out within the time set by the court.

##### **Collective Action**

Procedure binds only the parties to the proceedings. However, those affected by the injunction may opt-out from the effect of the judgment by simply (without formal requirements) contesting that effect.



## **SPV**

Actions are only binding on those who have joined the proceedings (or claims adjudicated therein).

### **Problems/Incompatibilities with Recommendation principles**

The WCAM procedure operates on an opt-out basis and every member included in the settlement who does not opt-out in time is bound by that settlement, including foreign parties. Dutch court can bind a large number of parties without their explicit consent, except if the parties enter the proceedings or, within the appointed period, send an opt-out declaration.

### **Collective ADR and Settlements (Para. 25-28)**

#### **WCAM**

The WCAM is a settlement procedure: the parties must reach an agreement which then is submitted to the court to make it binding. Regarding the other mechanisms, the organization bringing the claim must have tried to reach an agreement out of court before initiating the action.

Article 1018a Civil Code of Procedure that facilitates the appointment of mediation in relation to mass disputes

#### **Costs (Para. 13)**

The Loser Pays Principle applies, although the court might lower the costs depending on the complexity of the case.

#### **WCAM**

Court may declare that the costs are to be paid by one or more of the petitioners, but typically each party bears its own costs.

#### **Lawyers' Fees (Para. 29-30)**

Contingency fees are not permitted, as provided by the Dutch Bar Association's Code of Conduct.

#### **Collective Action**

The remuneration system for lawyers provides too little incentive to take part in collective redress proceedings and accordingly does not facilitate or encourage unnecessary litigation

#### **Prohibition of punitive damages (Para. 31)**

Punitive damages are unavailable

#### **Collective Follow- on actions (Para 33-34)**

Individual compensatory redress starts only after the final injunction/declaratory decision on a breach of law. Limitation periods can be suspended collectively by a letter from an organisation that is entitled to start a collective action. Such a letter or the start of a collective action bars the statute of limitation. Suspension continues for 6 months after the judgment in which period parties have the opportunity to start individual actions.

#### **Interplay between injunctions and compensation across all sectors**

Injunctive and compensatory actions may be brought within the single SPV proceedings.

#### **Collective Action**

There is no res judicata effect of the judgement in relation to individual group members and the exact effect in a subsequent individual compensatory

proceeding is unclear. A favourable judgement will be helpful but defendant may raise a defence.

# THE NETHERLANDS – REPORT

## I. General Collective Redress Mechanisms

Within Dutch law, three different Collective Redress mechanisms can be distinguished:

- The Collective Settlements of Mass Claims Acts (WCAM).
- Collective action, on the basis of articles 3:305a-305d Dutch Civil Code.
- Action on the basis of mandate/power of attorney and/or transfer/assignment of claims to a special purpose vehicle.

The aforementioned options may be combined.

In the Netherlands only non-profit entities, either ad hoc or pre-existing, that meet certain criteria can act in collective actions or conclude collective settlements under the WCAM. The (spv) entities under the third category do not need to be non-profit. The articles of association of these collective redress entities should identify its goals, one of which may be claiming damages for the benefit or on behalf of certain individuals for a specific case. Accordingly, the requirements for these entities are similar to those laid down in para. 4, points (a)-(c) of the Commission Recommendation. The requirement that the entities prove to the court that they have the administrative and financial capacity to bring a claim is part of a recent Bill making its way through the Dutch Parliament on collective damages actions (discussed below). Other goals could be the obtainment of a declaratory judgement or injunctive relief. Pre-existing entities are not created specifically for an individual case, but rather exist for promoting a general group of interests, which formally encompass the specific case or claim. An example is the Vereniging van Effectenbezitters (Association of Investors), which has acted for the benefit of investors in securities litigations. Another notable example is the Consumentenbond. This is the most prominent Dutch consumer organisation. There are no lists of pre-approved entities authorised to bring claims.

The most often used legal form for *ad hoc* special purpose vehicles is the foundation or as called in Dutch: *stichting*. The term *special purpose vehicle* will be used to refer to this type of ad hoc legal entities.

### ADR

Article 1018a Civil Code of Procedure that facilitates the appointment of mediation in relation to mass disputes.

## A. The collective settlement procedure (WCAM)

### 1. General description

The Collective Settlement procedure under the Collective Settlements of Mass Claims Acts (WCAM), was introduced in 2005 by the *Wet Collectieve Afwikkeling Massaschade*.<sup>561</sup> The law has been laid down in two codes: the

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<sup>561</sup> WCAM, Dutch Act on Collective Settlements, Law of 23 June 2005, Stb. 340. See articles 7:907-910 Dutch Civil Code, articles 1013-1018a Dutch Code of Civil Procedure

Dutch Civil Code with respect to the material requirements that a collective settlement should address in order to be found fair and reasonable and declared binding by the Amsterdam Court of Appeal and the Dutch Code of Civil Procedure that provides for the procedural rules to follow in order to declare a collective settlement binding. Minor improvements to the WCAM were made in 2013.<sup>562</sup>

## **2. Scope**

The WCAM procedure applies to all substantive areas of law. Furthermore, an agreement based on the WCAM is also possible with an insolvent party.<sup>563</sup>

## **3. Procedure**

### **a. Standing**

Under the WCAM procedure, the party or parties compensating the damages or contributing to the settlement fund and an entity representing the victims will conclude a settlement agreement. All the contracting parties then must jointly request the court to declare it binding for all victims that fall under the scope of the agreement.<sup>564</sup> The representative organisation must have full legal capacity to act in court, and the interest of the group that the organization is seeking to protect must be covered by its articles of association.

### **b. Opt-in; opt- out procedure**

The WCAM settlement must describe the group(s) of claimants that is (are) going to benefit from the settlement and the grounds for the claim.<sup>565</sup> After court approval, the settlement has a binding effect on all victims included in the terms of the settlement, except for those who have declared their wish to opt-out. The opt-out declaration must be made within the time set by the court.<sup>566</sup> The court sets up the opt out period and conditions to whom to address etc. If the opt out statement doesn't meet those requirements (for example too early or too late, not to the correct address and doesn't meet other requirements set by the court) the opt out is not valid and the member remains bound to the terms of the settlement. The settlement itself does not constitute an admission of fault. The individuals who have opted-out are not bound by the settlement terms and the judge who decides on their case in subsequent individual proceedings is free to ignore the settlement.<sup>567</sup>

### **c. Competent Court**

The WCAM procedure can only be brought before The Amsterdam Court of Appeal.<sup>568</sup>

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<sup>562</sup> Act of 26 June 2013), *Staatsblad* 2013, 255, entered into force 1 July 2013, *Staatsblad* 2013, 256.

<sup>563</sup> art. 110 (3) Dutch Insolvency Act.

<sup>564</sup> art. 1013(1) Dutch Code of Civil Procedure

<sup>565</sup> art. 7:907 (2) a-c Dutch Civil Code..

<sup>566</sup> art. 7:908(2) Dutch Civil Code. and art. 1017(3) Dutch Code of Civil Procedure

<sup>567</sup> Aandelenlease cases, HR 5 June 2009, LJN BH2815, BH2811, BH2822, *Nederlandse Jurisprudentie* 2012/182-184).

<sup>568</sup> art. 1013(3) Dutch Code of Civil Procedure

#### **d. Participation of foreign plaintiffs**

Assuming jurisdiction of the Dutch Court, a foreign representative organisation can participate in the WCAM procedure, as long as it has full legal capacity to act in court. Every victim who is included in one of the categories of the settlement and does not opt-out in time is bound by that settlement, including foreign parties.<sup>569</sup> These are not directly parties to the proceedings, but participate through a representative body. In specific cases rules of Private International Law may stand in the way of competence of the Dutch court, if the 'foreign' claim can only be brought before a non-Dutch court. This may apply in particular where the defendant is not located in The Netherlands.<sup>570</sup>

#### **e. Certification criteria**

The request in a WCAM procedure will be denied if the representative organisations together are not sufficiently representative of the whole group.<sup>571</sup> Hence, it is unnecessary for each individual organisation to be representative for the whole group, it is sufficient if it is representative for a subgroup. Furthermore, the Court assesses whether the agreement protects the interests of the group members concerned (art. 7:907 (3) e BW). There are no certification requirements neither in the context of WCAM settlements.

#### **f. Main procedural rules**

The WCAM proceedings<sup>572</sup> start with a joint petition by the settling parties to the Amsterdam Court of Appeal to declare the settlement binding on everyone falling within the scope of the settlement.<sup>573</sup> The parties for whose benefit the settlement was concluded, are notified of the settlement and of the oral hearing. A notice will be published in one or more newspapers.<sup>574</sup> It is possible for a foundation or association that promotes the interests of the group of claimants covered by the settlement to make objections against the settlement.<sup>575</sup> Any other ongoing proceedings regarding claims covered by the settlement are suspended during the WCAM proceedings.<sup>576</sup> The court may order additional expert evidence.<sup>577</sup> The court can further hold oral hearings to discuss the way in which the trial is to be conducted.<sup>578</sup> The decision should among other things, state whether the agreement is declared binding, and if so, the period during which an opt-out declaration must be made and the way in which it should be made, the period during, and the manner in which, a claim for compensation under the settlement can be filed.<sup>579</sup> The court can

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<sup>569</sup> see e.g. Hof Amsterdam 12 November 2010, NJ 2010/683, LJN: BO3908 (Converium).

<sup>570</sup> Kramer, X.E. (2014). [Securities Collective Action and Private International Law Issues in Dutch WCAM Settlements: Global Aspirations and Regional Boundaries.](#) *Pacific McGeorge Global Business & Development Journal*, 27 (2), 235-279.

<sup>571</sup> art. 7:907(3)f Dutch Civil Code

<sup>572</sup> WCAM proceedings are available only for parties who come to a settlement agreement. When one of the parties is unwilling to settle, one or more of them may request that the competent court holds a pre-trial meeting: art. 1018a Dutch Code of Civil Procedure

<sup>573</sup> art. 1013 Dutch Code of Civil Procedure

<sup>574</sup> art. 1013 (5) Dutch Code of Civil Procedure

<sup>575</sup> art. 1014 Dutch Code of Civil Procedure

<sup>576</sup> art. 1015 Dutch Code of Civil Procedure

<sup>577</sup> art. 1016 Dutch Code of Civil Procedure

<sup>578</sup> art. 1013 (8) Dutch Code of Civil Procedure

<sup>579</sup> art. 1017 Dutch Code of Civil Procedure

suggest modifications to the agreement.<sup>580</sup> In a recent WCAM-ruling, the Amsterdam Court of Appeal ruled that the parties should consider renegotiating certain parts of the settlement.<sup>581</sup> Appeal in cassation is open only to the original petitioning parties jointly and only if the court has rejected the request to make the agreement binding.<sup>582</sup>

### **Res judicata effect**

The WCAM settlement obtains binding effect on all victims included in the terms of the settlement, except for the individuals who have declared their wish to opt-out of the settlement. The opt-out declaration has to be made within the appointed time set by the court.<sup>583</sup> The settlement itself does not constitute an admission of fault. The individuals who have opted-out are not bound, and the judge who decides on their case is free to deviate from the settlement.<sup>584</sup>

### **Evidence/ discovery**

In a WCAM-procedure the court may order expert evidence.<sup>585</sup> Other evidentiary rules for petition proceedings do apply in principle, but in general no further evidence will be required considering the nature of the proceedings (determining whether the settlement may be declared binding, which does not involve a decision on the actual facts of the case). The court does check whether the amount of compensation is reasonable considering, inter alia, the extent of the damages and other factors. Evidence may only be necessary where another representative body contests the settlement.<sup>586</sup> The general discovery mechanism is art. 834a Rv, which allows any party to request (a copy of) materials to which it has a legitimate interest. This article has found a wide application.<sup>587</sup>

### **Single or Multi stage process**

The WCAM consists of a single-stage process. However, the court can hold pre-trial meetings or a case management conference to discuss the way in which the fairness hearing is to be conducted.<sup>588</sup> Furthermore, parties may also request a pre-trial case management conference.<sup>589</sup>

## **4. Available remedies**

The remedies in the WCAM procedure are the remedies that may be part of a settlement agreement. These include, primarily, monetary damages<sup>590</sup>, but may include also other obligations that require specific performance, as these

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<sup>580</sup> art. 7:907 (4) Dutch Civil Code

<sup>581</sup> Gerechtshof Amsterdam 200.127.525/1, May 13, 2014, downloadable through: <https://www.rechtspraak.nl/SiteCollectionDocuments/tussenbeschikking%20d.d.%20%2013%20mei%202014.pdf>

<sup>582</sup> art 1018 (1) Dutch Code of Civil Procedure

<sup>583</sup> art. 7:908(2) BW and art. 1017(3) Dutch Code of Civil Procedure

<sup>584</sup> Aandelenlease cases, HR 5 June 2009

<sup>585</sup> art. 1016 Dutch Code of Civil Procedure

<sup>586</sup> art. 1014 Dutch Code of Civil Procedure

<sup>587</sup> I.N. Tzankova, I van Maanen, M Rijnhart, 'a Dutch view on discovery: Short and sweet', *Defense Counsel Journal*, 91(3) 2014, p. 234.

<sup>588</sup> art. 1013 (8) BRv

<sup>589</sup> art. 1018a BRv, see 5.6 above

<sup>590</sup> see art. 7:907(1) Dutch Civil Code

are compensation of damage in kind.<sup>591</sup> It also may involve other types of remedies, such as declaring contracts null and void.<sup>592</sup> Dutch law does allow penalty clauses to aid in enforcement of the obligations of the agreement. In theory cy pres distribution is an option as well, but it has been applied to date only in out of court collective settlements (and not WCAM settlements that require a court approval).

## **5. Costs & funding**

In the Netherlands the loser pays rule applies. Also in a WCAM-procedure the court may declare that the costs are to be paid by one or more of the petitioners,<sup>593</sup> but there typically each party bears its own costs. Third party funding is allowed and currently unregulated.

## **6. Number of claims**

The WCAM procedure has been used eight times since its inception<sup>594</sup>, with a ninth ruling on the way<sup>595</sup>. The reason appears to be that there are not very many claims that could fall under the WCAM (as they should involve a significant number of individuals), while those that could, may also be settled via an out of court collective settlement agreement for the members of participants of the claimant organizations only, without recourse to the specific WCAM procedure, which also causes extra costs and delays the pay out of damages. Furthermore, the WCAM is voluntary in nature and only applies when a defendant is sufficiently motivated to settle.

## **7. Particularities/ Problems if mechanism is used in cross-border cases**

The WCAM procedure is available in cross-border cases, as long as the representative organisations are also sufficiently representative for foreign claimants.<sup>596</sup> The WCAM can also be used in cases where only a minority of claimants are Dutch and where the liable party has no ties to The Netherlands, as long as the Court of Appeal is competent to decide all claims under the settlement (Converium). The Converium case provided criteria in which the Court of Appeal could accept jurisdiction. For instance, the special purpose vehicle finds its statutory home in the Netherlands, the execution of the settlement will take place in the Netherlands and the funds will be transferred from a bank account in the Netherlands.<sup>597</sup> Foreign parties need to be notified of the proceedings, given the requirements of art. 6 ECHR (Converium case). In itself this makes the WCAM a useful instrument in

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<sup>591</sup> 'schadevergoeding in natura', art. 6:103 Dutch Civil Code

<sup>592</sup> art. 7:907 (7) Dutch Civil Code

<sup>593</sup> art. 1016 lid 2 Dutch Code of Civil Procedure

<sup>594</sup> Ilja Tillema, 'Tien jaar WCAM: een overzicht', MvO 2016 3&4, p. 90.

<sup>595</sup> Currently the VEB is involved in the WCAM-procedure against Ageas/Fortis, this is to be believed to be the ninth WCAM-settlement.

<sup>596</sup> Cf. Rechtbank 's-Gravenhage 30 January 2013, ECLI:NL:RBDHA:2013:BY9850 (Shell), Hof Amsterdam 12 November 2010, NJ 2010/683, LJN: BO3908 (Converium).

<sup>597</sup> Paragraph 2.9 of the decision by the Amsterdam Court of Appeal in case no. 200.070.039/01 on November 12<sup>th</sup> 2010, official sworn English translation is downloadable through:

[http://www.converiumsettlements.com/EN/Judgment\\_12\\_November\\_2010.pdf](http://www.converiumsettlements.com/EN/Judgment_12_November_2010.pdf)

reaching binding settlements in cross-border cases. However, it has been untested so far whether the WCAM that operates on opt out basis would be recognised and enforced in jurisdictions that view the opt out device as problematic.

## **8. Critiques**

With respect to cross-border cases, the versatility of WCAM has been criticised as it means that a Dutch court can bind a large number of parties without their explicit consent, except if the parties enter the proceedings or, within the appointed period, send an opt-out declaration.<sup>598</sup> This appears to apply even where the national system of the claimant and/or liable party does not allow for a loss of claim without an individual court procedure.<sup>599</sup> Another point of criticism is the limited grounds and options to appeal a WCAM judgement and the role of the Amsterdam Court of Appeal when reviewing and approving collective settlements. Some argue that the court should take a conservative approach, others believe the court should be acting as guardian of the interests of absent class members. That requires a more active approach.

### **B. Collective action**

#### **1. General description**

Collective actions, on the basis of articles 3:305a-305d BW (Dutch Civil Code), have been adopted in 1994 (Law of 6 April 1994, Stb. 269). These articles describe the rules according to which an organisation can instigate proceedings for the protection of a group of similar interests. The interests can be idealistic (such as environmental, animal protection, protection of heritage, artistic goals) or material (such as investment loss). The non-profit entity can't seek monetary damages through the collective action of 3:305a of the Dutch Civil Code.

#### **2. Scope**

The aforementioned provisions apply to all kinds of cases.

#### **3. Procedure**

##### **a. Standing**

The proceedings can only be started by an organisation that has the statutory aim of promoting the interests concerned (art. 3:305b BW); furthermore the interests have to be sufficiently alike in order to be bundled for efficient and

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<sup>598</sup> Hof Amsterdam 12 November 2010, NJ 2010/683, LJN: BO3908 (Converium)

<sup>599</sup> Halfmeier, Axel, Recognition of a 'WCAM' Settlement in Germany (April 5, 2012). Available at SSRN: <https://ssrn.com/abstract=2026701> or <http://dx.doi.org/10.2139/ssrn.2026701>

and <http://www.nipr-online.eu/pdf/2012-265.pdf>



effective legal protection. The interests of the claimants must be sufficiently protected and the organization must have tried to reach an agreement out of court before initiating the action. The court does not check materially whether the claim protects the interests of the persons concerned (art. 3:305a(2) BW). Representativeness is not required (see the Plazacasa case). In this case, the defendant argued that the foundation should be declared inadmissible since a majority of the foundations constituency opposed the litigation. The Supreme Court denied the request. The collective action does not exist for the sole benefit of litigating for the benefit of a confirmed majority, but is also available for a minority, who wishes to litigate to remedy infringed rights.<sup>600</sup> The requirement is met if the interests that are bundled by the claim lend themselves to bundling to ensure an efficient and effective legal proceeding.<sup>601</sup> An act cannot form the basis for a collective action if the individuals who are actually touched by the act contest using that act as the basis for the collective action (art. 3:305a(4) BW).

#### **b. Opt-in; opt-out procedure**

Formally, in a collective action the procedure binds only the parties to the proceedings e.g. the organization and the defendant. However, the judgment can have consequences for people whose interests are concerned with the decision. These may opt-out from the effect of the judgment by simply (without formal requirements) contesting that effect (art. 3:305a(5) BW). See in particular HR 26 februari 2010, LJN BK5756, NJ 2011/473 (Stichting Baas in Eigen Huis/Plazacasa BV)). This is only relevant when individuals do not wish (for example) to have an injunction regarding acts that they approve of; it does not touch on their individual right to damages as the collective action cannot lead to an award of damages. Given the fact that a judgement in a collective action doesn't have a binding effect on the people whose interests are concerned with the decision and is binding only on the organization one may wonder about the utility of art. 3:305a(5) BW. We are not aware of examples where this provision has been invoked.

#### **c. Competent court**

The normal rules of competence apply. Collective actions follow the regular European and national rules on court jurisdiction (main rule is domicile of the defendant).

#### **d. Participation of foreign plaintiffs**

There is no limitation regarding nationality; foreign plaintiffs can in principle be part of the proceedings or among the group of interested persons. However, such plaintiffs can make use of the Dutch collective action as long as the articles of association of the respective organization cover the scope of the action and include the interests of the foreign parties. An action regarding consumer protection can be instigated by a foreign organisation for protecting consumer interests as intended in art. 4(3) Directive 98/27/EC<sup>602</sup>.

#### **e. Certification criteria**

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<sup>600</sup> r.o. 4.2 ECLI:NL:PHR:2010:BK5756

<sup>601</sup> r.o. 4.2 ECLI:NL:PHR:2010:BK5756

<sup>602</sup> see art. 3:305c Dutch Civil Code. For an example see Rb Breda 9 July 2008, LJN BD6815

No certification criteria as such exist, except the aforementioned requirement for standing, that the organisation must according to its statutory description promote interests concerned in the action. Soft law exists in the form of a non-binding 'Claimcode'<sup>603</sup> with respect to the governance of claim organizations involved in 305a-collective actions. The code prescribes the composition and remuneration of Board and Supervisory Board members, financial reporting, communication with group members etc. It was established in view of potential conflict of interests by fraudulent *special purpose vehicles* and is an example of self-regulation. However, in relatively recent case law the lower court accepted the argument from the defence that the claimant had no legal standing since the organization didn't follow the non-binding Claim Code.<sup>604</sup>

#### **f. Main procedural rules**

There is no special procedure for the 305a-collective actions. The general rules of civil procedure apply. The court can decide to refer the case to another court or combine it with another related cases.<sup>605</sup> A 305a-collective action cannot be initiated if the organisation hasn't tried to resolve the matter out of court first.<sup>606</sup> To that end it has to send a notification to the defendant that it plans to initiate a collective action and an invite to discuss an out of court settlement. In cross-border cases this provision has been strategically used by defendants to the disadvantage of the claiming organization. The notification and invite for settlement discussions alert the defendant who then subsequently starts a negative declaratory action in a claimant unfriendly jurisdiction, which may cause a stay of the Dutch collective action. The collective action in the Netherland is then subject to a so called 'procedural torpedo'.

#### **g. Limitation Periods**

Dutch limitation periods can be suspended collectively by a letter from an organisation that is entitled to start a collective action.<sup>607</sup> Such a letter or the start of a collective action bars the statute of limitation. The limitation period is suspended until 6 months after the judgment in a collective action has been handed down (art. 3:316 under 2 Civil Code) in which period parties have the opportunity to start individual actions or until 6 months after the WCAM judgement (recent case law: HR 19 mei 1017, ECLI:NL:HR:2017:936)

#### **h. Res judicata effect**

The judgment has res judicata only between the parties in the procedure (and/or the claims adjudicated therein). Furthermore, the Hoge Raad has held that a declaration of law in such a procedure may serve as starting point in similar procedures started by other victims (HR 27 November 2009, LJN BH2162 (VEB/World Online), r.o. 4.8.2).. Hence a collective action may be useful as a step towards an individual award of damages.

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<sup>603</sup> :[http://www.consumentenbond.nl/over/wie\\_zijn\\_we/claimcode/](http://www.consumentenbond.nl/over/wie_zijn_we/claimcode/)

<sup>604</sup> ECLI:NL:RBOBR:2016:3383

<sup>605</sup> art. 3:305a (6) Dutch Civil Code

<sup>606</sup> art. 3:305a (2) Dutch Civil Code

<sup>607</sup> HR 28 maart 2014, [ECLI:NL:HR:2014:766](https://www.eclinet.nl/HR:2014:766) (VEB NCVB/Deloitte Accountants c.s.)

## **Evidence/ discovery**

The general rules regarding evidence and discovery apply.

## **Multi- stage process**

Collective actions follow a single process procedure.

## **4. Available remedies**

Only an injunction or declaratory judgment can be obtained; damages cannot be obtained, except damages suffered by the organisation

## **5. Costs & funding**

In collective actions the organization and not the group members is liable for potential adverse cost orders. In collective actions victims have to start subsequent individual actions to establish causation, liability and damages, there they have to fully bear their own costs except where compensation is obtained under the general rules. In collective actions funding is often obtained via contributions from individuals whose interests are at stake or who have an idealistic purpose in supporting the organisation. 305a organizations initiating collective actions do not qualify for Legal Aid.

In collective actions, legal aid is not available and contingency fees are not allowed. Many legal expense insurers have excluded full coverage or have limited coverage of mass claim disputes or collective actions. However, in some rare case they might cover the individual contributions of the client to a collective action.<sup>608</sup> Furthermore, there are no special funds in place to support collective action. In essence there are only two potential ways: individual contributions (if sufficient number of claimants participate) and commercial funding (but the terms have to be attractive) but in both there is the free rider problem: a positive judgment reached by the the organisation may be used by non-participating claimants in order to start their own procedure and/or reach favourable settlement with the defendant. The free rider probelm makes it more difficult to obtain external financing.

## **6. Lawyers' Fees**

The remuneration system for lawyers provides too little incentive to take part in collective redress proceedings. This causes underenforcement, rather than overenforcement.

## **7. Number of claims**

The exact number of collective actions that has been initiated after the introduction of the provisions in 1994 is unknown. However, the collective action has been used in more than 180 cases during 2007-2012, which amounts to roughly 40 procedures per year, according to the published case law at rechtspraak.nl. Research conducted on commercial incentives in collective redress in the Netherlands was also performed on 400 case studies,

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<sup>608</sup> I.N. Tzankova, *Funding of Mass Disputes – lessons from the Netherlands*, George Mason University School of Law 2012 volume 8, number 3, p. 581

from which 334 were considered unique.<sup>609</sup> There is no centralised register or account of collective actions in the Netherlands.

## **8. Particularities/ Problems if mechanism is used in cross-border cases**

In theory there are no issues when using the collective action in cross-border cases. In practice, that might be difficult to organize if there is no organization willing and capable to take on the case and finance it.

## **9. Critiques**

Collective action is to be initiated by non-profit entities that meet certain criteria but a representativity is not a requirement. It is suggested that some Claimstichtingen may actually not provide proper service for their clients, even if they meet the statutory requirements. (see further II.3.8.).

Also, multiple collective actions about the same event can take place and it can be confusing for group members and the defendant to choose 'the right' one. Finally, multiple actions might also lead to a so called 'adverse auction' by the defendant: picking up the weakest party to settle with. The flip side of this is that a collective action doesn't bring finality. There is no *res judicata* and a new organization can stand up, develop new legal arguments and start a new action.

## **C. Action on the basis of mandate and/or transfer of claims**

### **1. General description**

Collective redress for damages is pursued through mandates and/or transfer of claims to a special purpose vehicle. The individual claimants can either mandate their claim to the special purpose vehicle or transfer their claims to the special purpose vehicle, which thereafter can claim in its own right. Either way, these methods are essentially collections of individual claims. The legal entity is often a stichting (foundation) or (claimstichtingen). Claimants contract with the stichting that they will receive the award minus a share for the stichting. The claimants usually also pay a relatively small fee or 'contribution': the aggregate of all contributions is (with a sufficient number of claimants) sufficient to cover the costs (in particular lawyer fees).

### **2. Scope**

The scope of actions based on mandate and/or the transfer of claims follow the common rules on mandate and transfer. There are no restrictions here on the substantive scope either. There is a general rule that the assignments should not be against Dutch public order

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<sup>609</sup> Ilja Tillema, 'Commerciële motieven in privaatrechtelijke collectieve acties: olie op het vuur van de claimcultuur, Aers Aequi mei 2016, p. 341

### **3. Procedure**

#### **a. Standing**

Standing derives from the standing of the claimants represented, which means that (a) the claimant itself must previously have had standing as being directly harmed, and (b) the claimant must be properly represented, i.e. the entity must have a valid mandate to act in the name of the claimant, or the claim must have been transferred to the entity in a valid fashion. Furthermore, the defendant may request a detailed specification of the individuals represented or the individuals whose claims are being claimed in the procedure.<sup>610</sup>

#### **b. Opt-in; opt- out procedure**

The procedure is a normal court procedure hence the outcome only applies to those who have joined the proceedings (through mandate) or on those who got the claims assigned. However, the judgment may affect other similar claims.<sup>611</sup>

#### **c. Competent court**

The competence of the court is determined by the normal rules regarding competence for the specific case and/or claims. Usually the competence is based on the location of defendant, as that court is competent for all claims regarding the defendant, regardless of the specific situation of claimants (who may be located all over the world). However, it is also possible to base competence on the existence of damage in The Netherlands on on other alternative grounds for jurisdiction (Brussels I).

#### **d. Participation of foreign plaintiffs**

Foreign plaintiffs can participate on the same basis as Dutch plaintiffs in actions on the basis of mandate and/or transfer of claims if the law governing the mandate or transfer allows that and the mandate or transfer is legally valid according to that law. In specific cases rules of Private International Law may stand in the way of competence of the court, if the 'foreign' claim can only be brought before a non-Dutch court. This may apply in particular where the defendant is not located in The Netherlands.

#### **e. Certification criteria**

There is no certification. Note that the Claim Code (see B3e) doesn't cover actions initiated by spv's based on mandates or assignment of claims.

#### **f. Main procedural rules**

Actions on the basis of mandate and/or transfer of claims follow the general rules of civil procedure. Regarding representation, the stichting may start the procedure in its own name as formal plaintiff, and does not have to stipulate that it represents the material plaintiffs. If it is questioned whether the plaintiff is entitled to claim the requested award, the formal plaintiff must

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<sup>610</sup> HR 27 November 2009, LJN BH2162 (VEB/World Online)

<sup>611</sup> HR 27 November 2009, LJN BH2162 (VEB/World Online).

stipulate that it is mandated and if required offer proof of its mandate.<sup>612</sup> The procedure can, and often is, combined with a collective action on the basis of art. 3:305a BW.<sup>613</sup>

### **Res judicata effect**

The judgment has res judicata effect only between the parties in the procedure (and/or the claims adjudicated therein). Furthermore the Hoge Raad has judged that a declaration of law in such a procedure may serve as starting point in similar procedures started by other victims (HR 27 November 2009, LJN BH2162 (VEB/World Online), r.o. 4.8.2). Hence a collective action may be useful as a step towards an individual award of damages.

### **Evidence/ discovery**

No particular evidence/discovery applies. The general discovery mechanism is art. 834a Rv, which allows any party to request (a copy of) materials to which it has a legitimate interest. This article has found wide application.<sup>614</sup>

### **Multi-stage process**

In itself, the procedure is a single process, as the civil procedure is in general. The court may decide to adjudicate part of the dispute first.

## **4. Available remedies**

All kinds of remedies are available. The usual remedy consists of (material) damages, often combined with a declaratory judgment.

## **5. Costs & funding**

Actions on the basis of mandate and or/transfer of claims are typically financed via individual contracts by the claimants with the *special purpose vehicle*. The contract often stipulates that claimants will receive the award minus a percentage. Increasingly, ad hoc entities receive third party funding from commercial litigation funders or legal expense insurers. However, many legal expense insurers have excluded full coverage or have limited coverage of mass claim disputes They might cover the individual contributions of the client to an spv or to a collective action.<sup>615</sup>

## **6. Number of claims**

A claimstichting to reach an award or settlement seems to be used fairly often when events arise giving rise to mass claims, in the order of some 10-40 per year (based on news reports). However, such a claimstichting does not

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<sup>612</sup> HR 26 November 2004, LJN AP9665, NJ 2005/41, HR 26 February 2010, LJN BK4995, NJ 2011/474

<sup>613</sup> e.g. HR 2 December 1994, NJ 1996/246, also HR 2009 VEB/World Online

<sup>614</sup>

[https://pure.uvt.nl/ws/files/6973933/Tzankova\\_Van\\_Maanen\\_Rijnhart\\_A\\_Dutch\\_View\\_on\\_Discovery\\_Short\\_and\\_Sweet\\_Defense\\_Counsel\\_Journal\\_July\\_2014\\_1205347.PDF](https://pure.uvt.nl/ws/files/6973933/Tzankova_Van_Maanen_Rijnhart_A_Dutch_View_on_Discovery_Short_and_Sweet_Defense_Counsel_Journal_July_2014_1205347.PDF)

<sup>615</sup> I.N. Tzankova, *Funding of Mass Disputes – lessons from the Netherlands*, George Mason University School of Law 2012 volume 8, number 3, p. 581

always start a civil procedure. Furthermore there is no centralised register or account of such stichtingen, hence it is hard to give exact figures. A procedure of such a stichting is not easily searched for in case law databases as no particular legal rules apply. One reason why the stichting is not used more often is that there has to be a significant number of claimants to make it feasible (given the start-up costs), and the stichting or at least the harmful event has to become sufficiently known in order for individual claimants to look for a (or the specific) stichting for making good their claims. However, the existence of such stichtingen seems to have become common knowledge, and in almost every case of mass damage (with relatively small groups) there appear to be plans for starting such a stichting. E.g. events such as fraudulent investment funds, alleged faults of youth protection services, bankrupt banks.

## **7. Particularities/ Problems if this mechanism is used in cross- border cases**

In theory there are no major issues and the spv mechanism can be used in cross border setting, but differing applicable laws on the assignments and on the claims, and large numbers make litigating burdensome and potentially unmanageable absent adequate case management.

## **8. Critiques**

Actions on the basis of mandate and or/transfer of claim has met two main criticisms. First of all, the system is cumbersome insofar as the *special purpose vehicle* has (if asked for proof) to provide the identity of all specific claimants and claims in order to prove its mandate and/or the transfer of valid claims. This is an administrative hassle, while individuals also fear being subjected to undue pressure if their identities are known. Secondly, *special purpose vehicles* (claimstichtingen) are not supervised and may therefore attract unscrupulous individuals who use the *special purpose vehicle* primarily as a means to collect money, while reaching suboptimal results and not providing proper services.<sup>616</sup> However, that is not limited to actions on the basis of assignment of claims. In fact, it seems more likely to occur under a 305a collective action, because actions on the basis of mandates/assignments require significant investments and one might assume that parties applying that model will not jeopardize the investment by acting questionably.

Although the judgment does not have formal *res judicata* for non-participants, it may in fact serve as a material guidepost for new procedures regarding the same event.<sup>617</sup> A weakness (but not a critique per se) is the possibility of free riders.

## **Legislative Proposal of November 16<sup>th</sup>, 2016.**

On 16 November 2016, the Dutch Ministry of Justice presented a new Bill for collective damages actions. The proposal aims to make collective settlements

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<sup>616</sup> cf. Van Boom 2009, par. 3.5

<sup>617</sup> See HR 27 November 2009, LJN BH2162 (VEB/World Online) where the Hoge Raad also mentioned that the judgement regarding unlawful behaviour may serve as a starting point in other procedures.

more attractive for all parties involved by improving the quality of representative organizations, coordinating the collective (damages) procedures and offering more finality. It is unclear when or whether the Bill will be passed in its current form, but below are first impressions and a selection of some noteworthy features of the Bill.

1. The proposed regime covers all substantive areas of law, which is a continuation of the status quo. What is new, is that now damages can also be claimed collectively and not only declaratory and injunctive relief. The same requirements apply to all types of actions: injunctive, declaratory or damages. More specifically, under the new regime it will be harder for claimants to file actions for injunctive and declaratory relief (more under 5. and further).
2. Exclusive jurisdiction in the first instance would be with the Amsterdam District Court, but it would be possible to transfer the collective action to another district court if that would be more appropriate in a given situation.
3. There would be a registry for class actions so the public is notified once a class action has been initiated. A system of 'lead representative organizations' would be introduced to streamline the process if there are multiple candidates for the position. There could also be co-lead representative organizations, consisting of two or more organizations if that is appropriate for a specific action. Under the current regime it is possible to have multiple competing collective actions, a situation that is perceived as confusing for consumers and burdensome for defendants.
4. Only non-profit entities would be allowed to file the collective action, as under current law. Those could also be ad hoc foundations, but heavy governance requirements would be put in place for their Board and Supervisory Board structure, which would require D&O insurance, guarantees for non-profit background of the Board and Supervisory Board members, a website and communication strategy for the group, the preparation of financial statements etc. This would require a significant financial investment beforehand in the logistical infrastructure of the organization, and it is unclear how this could be funded on a non-commercial basis. There is an exception for matters with an idealistic public policy background. Those ad hoc foundations might be exempted from some of the requirements, but in fact the Bill puts the ad hoc foundations in a disadvantageous position in comparison to pre-existing non-profit organizations.
5. Moreover, the lead representative candidates would need to demonstrate expertise and track record in class actions, have a sufficient number of claimants supporting them in relation to the specific action, and have sufficient financial means. The parliamentary notes specify that the court might ask a neutral third party to review the agreement, which would not need to be shared with the defendant.
6. Opt out seems to be the main rule under the new regime, but this is somehow mitigated. Under the selection test for lead representative organization (see under 5 above), the candidate has to demonstrate that it has a large enough group of claimant supporters. The organization can't operate as an empty shell. This assumes at least some book-building effort beforehand and is therefore at least in part



an opt-in. After the lead representative organization is appointed, the whole group will be represented on an opt-out basis.

7. The lead representative organization would need to demonstrate the superiority of the collective action in comparison to individual law suits.
8. The lead representative organization would need to demonstrate a sufficient link with the Netherlands. The Dutch legislator has consulted the Dutch State Commission for Private International Law and the Advisory Commission on Civil Procedure in relation to that requirement. According to the legislature, the test for a sufficient link with the Netherlands is compatible with the Brussels I Regulation, because it does not concern the jurisdictional test but the certification of a civil action, which is a matter of national civil procedure. It aims to exclude situations where the defendant is not based in the Netherlands, the harmful events did not take place in the Netherlands or the majority of the claimants are not domiciled in the Netherlands. In those situations the claimants will still have the option of starting an individual action. This requirement seems to aim to address the recent *VEB v BP* type of collective actions, where the Dutch Investors' Association VEB initiated a collective action for declaratory relief for all investors who had their BP shares in bank accounts in the Netherlands, following the ECJ's criteria formulated in the *Kolassa* ruling (C-375/13). The Amsterdam District Court declared on 28 September of this year that it lacked jurisdiction to hear the action, which is questionable in view of the *Kolassa* ruling. The current proposal aims to eliminate the use of the new Dutch collective actions regime in situations where Dutch courts under Brussels I and ECJ case law would have jurisdiction to hear individual cases for the 'Kolassa type' of claimant, but those would not be able to use the Dutch collective action regime to effectuate their rights.
9. Group members could opt out at the beginning of the certified class action and start an individual proceeding, but those individual proceedings could be stayed at the request of the defendant, at least for one year after the parties opted out. The court would have discretion to allow the stay of the proceedings. This departs somewhat from the systems existing in other jurisdictions (e.g. US and Canada) where claimants who opt out can resume their individual actions with no delays.
10. The collective action tolls the statute of limitation for the whole group represented by the lead representative organization. Parties who choose to opt out need to preserve their individual rights within 6 months after they have opted out. Under Dutch law it is not necessary to start a civil action to preserve one's rights. It is sufficient to send a letter to that effect to the defendant.
11. Under current Dutch law, adverse cost orders are fixed. Under the proposal it would be possible for the lead representative organization to recover the real costs of litigation if parties reach a settlement. The lead representative organization would be liable for any adverse costs if it loses the action.
12. Any settlement reached under the new collective action regime would need to be approved by the District Court. It is unclear whether the new regime aims to limit the extra-territorial application of the WCAM:

the Dutch act on collective settlements that has already been used twice for global settlement purposes. Presumably not, if globally settling parties choose to invoke the WCAM directly and not via the Dutch collective action regime. Furthermore there are the specific *Claimstichtingen* (see general part) that instigate proceedings. No specific sector collective redress mechanisms exist in the area of competition or financial market law.

## II. Sectoral Collective Redress Mechanisms

### A. Consumer law

The general mechanisms for collective redress apply also for consumer collective redress. However, there are a few specific rules for certain elements of consumer law. The general mechanisms apply to the whole of consumer case law. The scope isn't limited within consumer law. For specific interests, there are specific material provisions. Furthermore, there are specific rules for specific parts of consumer law. The procedure follows the same general rules. Art. 6:240 BW specifies (inter alia) that a representative organisation for consumers can start a procedure against unfair general conditions. There are no diverging procedural rules on opt-in; opt-out procedures. As for the competent court. The general rules apply. For a procedure against unfair general conditions on the basis of art. 6:240 BW, the Court of Appeal at The Hague has sole competence.<sup>618</sup> A provision is included that allows foreign representative consumer organisations or consumer authorities to start proceedings against unfair general conditions.<sup>619</sup>

Furthermore, art. 3:305c BW (see above) allows foreign organisations on the list of the European Commission to instigate a collective action, see above. In cases regarding unfair contract terms, there are specific rules regarding the court summons for an association representing companies using certain general contract terms.<sup>620</sup> The proceedings regarding unfair general conditions are not admissible if the representative consumer organisation did not, prior to the proceedings, give the user of the general conditions the opportunity to change the conditions.<sup>621</sup> The *Consumentenbond* (Dutch association of consumers) is fairly active, with multiple court procedures each year, which mostly involve general consumer protection on the basis of art. 3:305a BW.<sup>622</sup> Furthermore there are the specific *special purpose vehicles* (see general part) that instigate proceedings. No specific sector collective redress mechanisms exist in the area of competition or financial market law.

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<sup>618</sup> art. 6:241(1) Dutch Civil Code

<sup>619</sup> art. 6:240(6) Dutch Civil Code

<sup>620</sup> art. 1003-1007 Dutch Code of Civil Procedure, see further art. 6:240-243 Dutch Civil Code

<sup>621</sup> art. 6:240(4) Dutch Civil Code

<sup>622</sup> For a more complete overview, visit the *active case page* on <https://www.consumentenbond.nl/acties/overzicht>

## **B. Financial market law**

### **1. General description**

No specific collective redress mechanism exists in this area.

### **2. Case Law**

The general mechanisms have been used frequently for redress regarding financial market claims. See for example:

HR 23 December 2005, LJV AU3713, Nederlandse Jurisprudentie 2006/289 (Safe Heaven)

HR 13 October 2006, LJV AW2080, Nederlandse Jurisprudentie 2008/528 (Vie d'Or)

HR 5 June 2009, LJV BH2815, BH2811, BH2822, Nederlandse Jurisprudentie 2012/182, 183 en 184 (Effectenlease)

HR 27 november 2009, LJV BH2162 (VEB/World Online)

Hof Amsterdam 25 januari 2007, NJ 2007, 427 (Dexia)

Hof Amsterdam 29 april 2009, LJV: BI2717 (Vie d'Or)

Hof Amsterdam 15 juli 2009, LJV: BJ2691 (Vedior)

Hof Amsterdam 29 mei 2009, LJV: BI5744 (Shell)

Hof Amsterdam 12 november 2010, LJV:BO3908 (Converium)

HR 7 November 1997, NJ 1998/268 (Philips/VEB): union of stockholders (VEB)

HR 2 December 1994, NJ 1996/249 (Coopag/ABN AMRO)

## **C. Product liability law**

### **1. General description**

No specific collective redress mechanism in this area exists.

### **2. Case Law**

See in particular the DES-case (HR 9 October 1992, Nederlandse Jurisprudentie 1994/535). In that case, producers of a medicine that was used by pregnant women, and lead to medical problems with the daughters of those women, were found to be joint and severally liable. The claims have finally been settled under the WCAM (see above). The procedure formally only concerned 5 individual claims, however it was intended and viewed as a general example for all other claims regarding DES.

Also HR 30 June 1989, Nederlandse Jurisprudentie 1990/652 and HR 20 September 1996, Nederlandse Jurisprudentie 1997/328 regarding Halcion in which 41 individual claims were involved.

Cf. also HR 29 November 2002, Nederlandse Jurisprudentie 2003/549 (Legionella) which was not about product liability in the strict sense, but about a hot tub on a trade fair that spread legionella disease to fair visitors.

## **D. Other areas**

No specific collective redress mechanisms exist in other areas. There are however examples in case law of the application of general mechanisms to specific sectors. These are listed below. The material legislation for these sectors is described here and below, section IV.2.5.

### **1. Equality Law**

An example is the collective action regarding the exclusion of eligibility of women by a Christian political party (HR 9 April 2010, LJN BK4549), which was based in particular on art. 1 Grondwet (Constitution) as well as art. 25 and art. 26 International Covenant on Civil and Political Rights (ICCPR), while the procedure was a collective action based on art. 3:305a BW.

### **2. Environmental Law**

In environmental law, the collective action of art. 3:305a BW is regularly used by environmental protection organisations. There is extensive case law. See for example:

HR 27 June 1986, NJ 1987/743 (Nieuwe Meer), where a right for collective action was accepted before art. 3:305a BW was adopted and in force.

HR 18 December 1992, NJ 1994/139 (Kuunders) regarding possible pollution in a natural conservation area,

Rechtbank 's-Gravenhage 14 September 2011, LJN BU3538 and Rechtbank 's-Gravenhage 30 January 2013, ECLI:NL:RBDHA:2013:BY9850 regarding liability of Shell for an oil spill in Nigeria. This case is partly a collective action on the basis of art. 3:305a BW by Milieudefensie.

The action of art. 3:305a BW does not lead to damages (except procedural costs of the organisation itself); it aims mainly at obtaining an injunction or declaratory judgment.

See further E. Bauw, E.H.P. Brans, Milieuprivaatrecht, Deventer: Kluwer 2003, par. 7.4.2, p. 316-322. Regarding cross-border cases see p. 383-393.

### **3. Labour Law**

Art. 15 Wet op de collectieve arbeidsovereenkomst (Law on collective labour agreements, stipulates that an organisation that has entered into a collective labour agreement can, in a case where another party or its members acts in violation of obligations under that agreement, claim damages for the organisation as well as damages for its members. Art. 16 adds that immaterial damages can also be recovered, albeit at an amount to determine ex aequo (naar billijkheid).

In overview, art. 15 Wet CAO did not receive much use (Losbladige Arbeidsovereenkomst, Wet CAO, art. 15, aant. 3 (Olbers), referring to M.M.

Olbers, SMA 1988, p. 214-215), although in recent years this seems to have changed somewhat, looking at published case law. There are regular cases in which damages are claimed and sometimes awarded by representative organisations, in the order of 1-10 per year are published.

There is Hoge Raad case law on details of these rules:

HR 2 November 1979, NJ 1980/227

HR 18 September 1992, NJ 1993/49

HR 11 April 2003, LJM AF3425

**Table - Case Law**

Year	Court	Subject	Keywords
2014	Hoge Raad 28 March 2014, ECLI:NL:HR:2014:766	General	Collective action, prescription
2013	Hof Amsterdam 12 November 2013, ECLI:NL:GHAMS:2014:4560 (DSB)	Consumer Law	WCAM
2013	Rechtbank 's-Gravenhage 30 January 2013, ECLI:NL:RBDHA:2013:BY9850 (Shell)	Environmental law	Collective action
2012	HR 12 October 2012, LJM BW9243, Nederlandse Jurisprudentie 2012/686	General	WCAM, opt-out, representation
2011	Hoge Raad 28 January 2011, LJM BO5822, Nederlandse Jurisprudentie 2011/59	General	WCAM
2010	Hoge Raad 9 April 2010, LJM BK4549 (SGP case)	Equality	Collective action
2010	HR 26 februari 2010, LJM BK5756, NJ 2011/473 (Stichting Baas in Eigen Huis/Plazacasa BV)	General	Collective action
2010	Hof Amsterdam 12 november 2010, NJ 2010/683, LJM: BO3908 (Converium)	Financial law	WCAM, private international law, jurisdiction
2009	HR 27 november 2009, LJM BH2162 (VEB/World Online)	Financial law	Collective action, mandate/transfer
2009	HR 5 June 2009, LJM BH2815, BH2811, BH2822, Nederlandse Jurisprudentie 2012/182, 183 en 184 (Effectenlease)	Financial law	WCAM, collective action, mandate/transfer

Year	Court	Subject	Keywords
2009	Hof Amsterdam 29 april 2009, NJ 2009/448, ECLI:NL:GHAMS:2009:BI2717 (Vie d'Or)	Financial law	WCAM, binding settlement
2007	Hof Amsterdam 25 januari 2007, NJ 2007/427, ECLI:NL:GHAMS:2007:AZ7033 (Dexia)	Financial law	WCAM, binding settlement
2006	HR 13 October 2006, LJN AW2080, Nederlandse Jurisprudentie 2008/528 (Vie d'Or)	Financial law	Collective action
2006	Hof Amsterdam 1 juni 2006, NJ 2006/461, ECLI:NL:GHAMS:2006:AX6440 (DES)	Product liability	WCAM, binding settlement
2005	HR 23 December 2005, LJN AU3713, Nederlandse Jurisprudentie 2006/289 (Safe Heaven)	Financial law	Representative action, mandate/transfer

# POLAND – FACTSHEET

## Scope

Polish civil procedure provides for:

- A class action procedure of judicial nature (injunctive and compensatory) available for: consumer law, product liability, other tort liability cases (environmental protection law, competition law, IP law, labour law, as far as they concern tortious acts).
- A representative procedure of an administrative nature in consumer cases (injunctive).

## Standing (Para. 4-7)

The class representative in Poland is the 'named party' who brings the case in his own name but on behalf of all class members. The Act limits the persons who can represent the class to two categories: class members and regional consumer ombudsmen.

## Problems/Incompatibilities with Recommendation principles

A number of problems arise with regard to the regional consumer ombudsmen's potential role in class actions. They may not have the territorial and financial 'reach' necessary to organize and coordinate a class action.

The prerogatives of consumer ombudsmen, as specified by legislation, cover protection of consumer rights: they cannot represent persons who are not consumers.

## Admissibility (Para. 8-9)

There are four distinct stages in the class action procedure. In the first stage, the court notifies the defendant of the lawsuit, and considers whether all the requirements have been met (at least ten people with claims of the same kind and with the same or similar factual basis) and thus whether the class action can be certified.

## Information on Collective Redress (Para. 10-12, 35-37)

After the class certification decision is final, the court issues a statement on the commencement of the class action, including information that potential class members can join the class within a period specified by the court.

The Minister of Justice is also required to publish information about all class actions in which the statement on the commencement has been issued. However, no such information has been published yet by the Ministry.

## Problems/Incompatibilities with Recommendation principles

No national registry.

## Funding (Para. 14-16)

The Class Actions Act does not allow class representatives to obtain legal aid (which in Poland consists of legal assistance nominated by court and a waiver of court fees). The only types of available funding are: contingency fee agreements (success fees) with lawyers, and private funding.

In fact, most cases are self-funded privately by each class member.

### **Problems/Incompatibilities with Recommendation principles**

Third party funding is not prohibited and unregulated.

#### **Cross Border Cases (Para. 17-18)**

The class action procedure is not limited in scope to domestic cases only. It is also not limited to Polish citizens.

#### **Expedient procedures for injunctive orders (Para. 19)**

The consumer injunctions procedure includes a possibility of an interim decision by the Head of UOKiK, if it is probable that the conduct, if continued, may cause serious and irrevocable damage to the collective interests of consumers. This interim relief decision can remain in force until the final decision in the case is taken.

#### **Efficient enforcement of injunctive orders (Para. 20)**

The Class Action Act does not contain specific rules on interim measures. The general rules from the Code of Civil Procedure applies. It is possible to obtain an 'execution title': needs to be duly authorised by a court in order to become an execution title that can be used by the execution authorities (including the bailiff).

#### **Opt In/Opt Out (Para. 21-24)**

The Polish Class Action procedure is an opt-in procedure.

The Class Action Act requires that class members who have monetary claims make them equal with the other class members. This standardisation requirement means that those who decided to opt in may sometimes need to modify their claims to make them equal with the others.

### **Problems/Incompatibilities with Recommendation principles**

The standardisation requirement constitutes an exception from the principle of full compensation, and was criticized as unconstitutional. It causes many substantive and procedural problems for class members.

#### **Collective ADR and Settlements (Para. 25-28)**

Class Actions Act: the Court may refer the parties to mediation at any stage of the proceedings.

Code of Civil Procedure: the judge in the case should encourage the parties to settle the dispute.

The court will approve the settlement unless it is apparent from the circumstances that it is contrary to law or to the principles of social cooperation.

#### **Costs (Para. 13)**

Following the 'loser pays rule', the losing party covers the other party lawyers' fees only up to the tariff rate established by law. The law also provides a number of restrictions to the loser pays principle (if a party only partly won, unreasonable behaviour...).

#### **Lawyers' Fees (Para. 29-30)**

The Class Actions Act allows lawyers to agree to a success fee as the only form of remuneration. It appears that in practice these types of agreements are extremely rare.



### **Problems/Incompatibilities with Recommendation principles**

Contingency fees are allowed.

#### **Prohibition of punitive damages (Para. 31)**

No punitive damages are allowed under Polish civil law.

#### **Collective Follow- on actions (Para 33-34)**

The judgement concluding a declaratory relief class action may be used in further individual litigation or ADR proceedings seeking individual redress.

#### **Interplay between injunctions and compensation across all sectors**

The Polish Class Actions Act does not contain specific provisions on the types of remedies available. However article 2.3 of the Act provides that, in an action involving a monetary claim, the claim “may be limited” to the defendant’s liability. Thus in theory, it is possible to seek injunction and compensation in one single claim. However in practice, the limitation in article 2.3 is applied because of the difficulties caused by the “standardisation” requirement. Class actions are limited to declaratory relief, and the decision is then used as a base for individual compensation.

### **Problems/Incompatibilities with Recommendation principles**

For compensatory claims, the standardisation requirement means reducing claim amounts to the level of the person whose damages are the lowest in the class. Lawyers representing class members report that they advise them to limit the claim to declaratory relief only, to then use the injunction as a base for individual compensatory claims.

# POLAND – REPORT

## I. General Collective Redress Mechanism

### 1. Scope/ Type

#### a. Horizontal/ sectoral

The Polish Class Actions Act was initially contemplated as an entirely generic procedural mechanism. It is still relatively wide in scope, especially following the 2017 amendment. Thus it should be considered a horizontal mechanism and discussed under the general section of the report.

Due to last-minute amendments in the upper chamber of the Polish Parliament – the *Senat* – Article 1.2 specifies currently that the Act covers only “consumer claims, product liability claims and tort liability claims, excluding claims for the protection of personal interests”.

The debate concerning this amendment was very heated, and when the matter was voted again in the lower chamber (*Sejm*, the approval of which is required for all *Senat*'s amendments), 199 MPs voted against it and only 12 more – 211 – were in favour. The *Senat* also considered including labour law disputes, but this fell through because of concerns for the relatively fragile state of Polish industry.<sup>623</sup>

To summarize, class actions can currently be brought in the following types of cases:

- Consumer law cases, including for instance: unfair contractual clauses, unfair commercial practices, consumer credit, package holiday, consumer sales (all cases involving consumer rights: M. Sieradzka, *Dochodzenie Roszczeń w Postępowaniu Grupowym. Komentarz*<sup>624</sup>
- Product liability cases based on the implemented Product Liability Directive (articles 449.1 – 449.11 of the Civil Code of 1964, as amended), as well as on traditional fault-based tort liability provisions of the Civil Code (especially article 415),
- Other tort liability cases: including medical negligence, liability of state bodies for actions or omissions while exercising public authority (also for issuing legislative or administrative decisions), liability for actions or omissions of another person, or for damage caused by an animal, and, as far as they concern tortious acts: liability within the areas of environmental protection law, competition law, IP law, labour law.

They cannot currently be brought in the following types of cases:

- Contract claims between businesses,
- Unjustified enrichment claims between business,
- Claims in the areas of environmental protection, competition, IP and labour law that do not involve tort liability,

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<sup>623</sup> (Explanatory Note to the Class Actions Act, published in *Druk Sejmowy* (parliamentary note) No. 1829 of 26 March 2009. Also available on the following website: <http://www.festivalparkopole.pun.pl/viewtopic.php?pid=6> (accessed on 5 May 2017)).

<sup>624</sup> (Bringing claims as class actions. Commentary), 2nd Edition, Wolters Kluwer, Warszawa, 2015, p. 118),

- Claims concerning protection of personal interests, whether in consumer cases, product liability or tort liability cases. These include personal injury claims (see below for further analysis).

The 2017 amendment of the Act widens its scope. Contractual claims, and unjustified enrichment claims between businesses are going to be covered. No other changes in scope were introduced apart from the narrowing down of the 'personal interests' exclusion, explained below.

Exclusion of claims for the protection of personal interests earned the Act some of the most severe criticisms. This limitation was motivated by the fact that such claims are by their very nature individualized and should therefore, according to the legislator, be sought through individual actions in court.<sup>625</sup>

Personal interests are listed in the Civil Code: they include health, freedom, dignity and good name, conscience, name, image, correspondence, home, and creative output).<sup>626</sup> Scholars agree that the list is non-exhaustive. Claims for the protection of personal interests can have a pecuniary nature, such as costs of treatment or lost earnings in cases of personal injury, or a non-pecuniary nature such as pain and suffering. The exclusion of claims for the protection of personal interests from the scope of the Class Actions Act meant in practice that no personal injury claims could be brought using the procedure (for further implications of this position see below, in the 'Impact' section). This issue was examined in the case concerning claims by family members of victims of the collapse of the Katowice Trade Hall in January 2006.<sup>627</sup> While confirming that personal injury claims are indeed claims for the protection of personal interests excluded from the scope of the Act, the Supreme Court rejected the arguments of both first instance courts and ruled that claims of persons whose family members died as a result of an accident were not claims for the protection of their personal interests, but rather claims concerning monetary interests. This was so as long as these claims concerned the decreased standard of living as a result of losing a family member. Thus, according to the Supreme Court, they could be brought using the Class Actions Act even before the amendment.

The 2017 amendment of the Act extended its scope to claims for the protection of personal interests as long as these claims concern personal injury (the literal translation from Polish is "damage to body or injury to health" – article 1.2a of the Act). Further, claims by family members of a person who died as a result of sustaining personal injury are also to be covered. This amendment was welcomed by scholars and legal practitioners. The extension of the scope of the class action procedure was somewhat moderated by the requirement that monetary claims concerning personal injury, including those of family members, must be brought as 'liability-only suits' (article 1.2b).

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<sup>625</sup> (T.Jaworski, P.Radzimierski, "Ustawa o dochodzeniu roszczeń w postępowaniu grupowym. Komentarz", Warszawa, 2010, Wydawnictwo C.H.Beck, p.66).

<sup>626</sup> Article 23 of the Civil Code. On their protection in Polish tort law see E. Baginska, M. Tulibacka, "Poland", in *International Encyclopaedia of Laws: Tort Law*, Edited by Ingrid Boone, Alphen aan den Rijn, NL: Kluwer Law International, 2014, pp. 194-198

<sup>627</sup> Supreme Court decision of 28 January 2015, I CSK 533/14; judgements in the earlier attempts at bringing a class action in this case were examined in: M. Tulibacka, "An Update on Polish Class Actions" on <http://globalclassactions.stanford.edu/content/update-polish-class-actions>

## **b. Injunctive or compensatory or both**

As mentioned above, the Act allows bringing compensation claims, injunction claims, or liability-only claims.

## **2. Procedural Framework**

### **a. Competent Court**

The courts with jurisdiction to consider class actions in the first instance are district courts rather than the (lower) regional courts. A panel of three professional judges is required. The decision to give district courts the power to consider class actions was motivated by the complexity of these cases and their novelty in the Polish system, as well as the importance of the interests at stake: the interests of class members, and the interests of justice.<sup>628</sup>

Ordinarily, cases in district courts are considered by one professional judge. Class actions are treated as a special type of action requiring further attention and expertise. Further, by consolidating the jurisdiction within a smaller number of district courts the Act aims to enable their judges to accumulate experience of class actions and handle them with confidence.<sup>629</sup>

### **b. Standing**

Class actions can be brought in the name of at least ten people. Class members must have claims of the same kind. For instance: monetary claims, although there may be two or more types of claims included in the case, for instance a monetary claim and a request to stop certain conduct, as long as these are of the same kind among all class members – this point was confirmed in the certification decision of 26 April 2016 of District Court of Warsaw, XXV C 915/14. The claims must have the same or similar factual basis, such as the presence of the same or similar unfair clause in consumer contracts, the same tortious conduct, use of a certain product manufactured or imported by the defendant, or the same unfair commercial practice by a trader - article 1.1. This provision was not changed in the 2017 amendment.

The class representative in Poland is the 'named party' who brings the case in his own name but on behalf of all class members. The Act limits the persons who can represent the class to two categories:

1. class members and
2. regional consumer ombudsmen.

The latter can only bring a class action within the scope of their prerogatives (article 4.2). Regional consumer ombudsmen are public functionaries operating alongside the local (*powiat*) authorities. They were established by the Act of 5 June 1998 *on powiat self-governance authorities (o samorządzie powiatowym)*.<sup>630</sup> Their powers were regulated by the Act of 16<sup>th</sup> February 2007 on the protection of competition and consumers (later amended, published in Dziennik Ustaw of 2017, item 229). These powers include

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<sup>628</sup> M. Sieradzka, *Dochodzenie Roszczeń w Postępowaniu Grupowym. Komentarz* (Bringing claims as class actions. Commentary), 2nd Edition, Wolters Kluwer, Warszawa, 2015, p. 184; and Explanatory Note to the Class Actions Act, published in Druk Sejmowy (parliamentary note) No. 1829 of 26 March 2009. Also available on the following website: <http://www.festivalparkopole.pun.pl/viewtopic.php?pid=6> (accessed on 5 May 2017).

<sup>629</sup> M. Sieradzka, *ibid*, p. 184

<sup>630</sup> Published in Dziennik Ustaw of 2001 r., No. 142, item 1592

mediating disputes between consumers and traders, consumer advice, and bringing litigation or joining litigation in consumer matters.

A number of problems arise with regard to the regional consumer ombudsmen's potential role in class actions. Albeit dealing with consumer matters in their work, consumer ombudsmen may not have the territorial and financial 'reach' necessary to organize and coordinate a class action. Prosecutors and non-governmental organizations, such as consumer associations, could potentially ensure such greater 'reach', but they cannot bring class actions currently. A further problem relates to the exact scope of the ombudsmen's power to represent a class. As mentioned above, the Act requires that ombudsmen act as class representatives within the scope of their prerogatives. The prerogatives of consumer ombudsmen, as specified by legislation, cover protection of consumer rights. It is therefore clear that they cannot represent persons who are not consumers. This could be a problem in cases where some class members are consumers and others – small businesses. Consumer ombudsmen are wary of this limitation and would be reluctant to get involved in litigation which might involve businesses as well as consumers.<sup>631</sup> The problem is of course that at the time of bringing the lawsuit it is not always possible to ascertain that all class members are consumers. In the light of these issues, some consumer ombudsmen are very sceptical about the true value of their new power. Marek Radwański even referred to it as a 'façade' and 'propaganda' rather than a true possibility.<sup>632</sup>

All class representatives, including consumer ombudsmen, must be represented by a barrister or solicitor, unless they themselves are a barrister or solicitor (article 4.4). This requirement for consumer ombudsmen was confirmed by the Supreme Court in the judgement of 13 July 2011.<sup>633</sup>

### **c. Availability of Cross Border collective redress**

The class action procedure is not limited in scope to domestic cases only. It is also not limited to Polish citizens. In cases where foreign claims or foreign parties are involved, the rules of private international law will apply.

### **d. Opt In/ Opt Out**

#### **Principal availability of either/or/both options?**

The Polish Class Action procedure is an opt-in procedure. No opt-out option has been considered so far, and it is unlikely that it will be proposed any time soon.

#### **Below is a short analysis of the provisions concerning opting-in to a class action, including publicity:**

After the class certification decision is final (see below for the structure of the proceedings), the court issues a statement on the commencement of the class action.

This statement contains:

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<sup>631</sup> Marek Radwański "Powiatowy (miejski) rzecznik konsumentów w postępowaniu cywilnym" (regional (town) consumer ombudsman in civil proceedings), 2012 Biuletyn Rzeczników Konsumentów, No. 1, pp. 4 – 8, [http://www.rzecznicy.konsumentow.eu/biuletyny/Biuletyn\\_rzecznikow\\_nr\\_1\\_2012.pdf](http://www.rzecznicy.konsumentow.eu/biuletyny/Biuletyn_rzecznikow_nr_1_2012.pdf). Marek Radwański is the regional consumer ombudsman for Poznań

<sup>632</sup> *ibid*

<sup>633</sup> III CZP 28/11.

- Information about the court where the class action is going to be taking place,
- Information about the parties and the subject of the action,
- Information that potential class members can join the class within a period specified by the court (between one and three months from the publication of the statement) by submitting a written document to this effect to the class representative,
- Information on the lawyers' fees and the payment arrangements,
- Information on *res judicata* for all those who join.

Potential class members are thus given a specified time period for joining the action, and they cannot join after the time period expires (article 11.5). This issue is explored below, in the section concerning potential lack of conformity of the Polish class action procedure with the Recommendation (Recommendation no. 22 and 23). Class members cannot join and leave the class at simply any stage of the proceedings. The time frame for joining and leaving is regulated quite strictly.

#### **e. Main procedural rules**

##### **Admissibility and certification criteria**

As mentioned above, class actions can be brought in the name of at least ten people with claims of the same kind and with the same or similar factual basis (article 1.1). The Act does not have many other detailed certification criteria, although it does contain a very interesting commonality requirement that seems quite unique. The Act requires that class members who have monetary claims make them equal with the other class members (albeit this can be done in sub-classes of at least two people) (article 2.1). This standardisation requirement was made more precise in the 2017 amendment, but no significant changes were made.

Thus, those who decided to opt in and join the class may sometimes need to modify their claims to make them equal with the others. They are covered by *res judicata* and cannot claim additional amounts in separate actions. This requirement was criticized as unconstitutional (taking away the constitutional right to access justice – to the extent that one needs to forego a part of one's claim).<sup>634</sup> Even if one were to acknowledge that this criticism may result from a misunderstanding of the nature and purpose of class actions, it must be recognized that the requirement causes many substantive and procedural problems for class members. Lawyers representing them argue that it means reducing claim amounts to the level of the person whose damages are lowest in the class (or sub-class) because according to ordinary civil procedure rules, Polish courts will not award compensation above the actual damage. In fact, this is the provision most commonly mentioned by those who are disappointed by the new Act.

The response to this limitation may well be exactly what the drafters of the Act intended. If a case involves class members with different levels of

<sup>634</sup> A. Kubas, R. Kos, „Opinia w sprawie projektu ustawy o dochodzeniu roszczeń w postępowaniu grupowym” (druk sejmowy nr 1829), Kraków, 20.10.2009, p. 4. The lawyers representing victims of floods intending to bring class actions against the state authorities also expressed this view: in M. Domagalski „Pryśka mit pozwów zbiorowych” (the myth of class action dispelled), Rzeczpospolita, 28.06.2010, <http://www.rp.pl/artukul/503821,527163-Pozwy-zbiorowe-w-praktyce-trudniejsze.html>

damage caused by the same or similar event, the requirement is often circumvented. Lawyers representing class members report that they advise them to limit the claim to declaratory relief only. This option is expressly allowed by the Act (Article 2.3). Indeed, a large law firm based in Kraków (Kos, Kubas & Gaertner (KKG)) representing class members in a number of suits reported that this was done in at least three cases. In an interview (July 2012), one of the partners of KKG – Professor Kubas referred to the possibility of bringing a declaratory relief suit as a measure that ‘saves’ the Act’s utility in many ordinary cases. His view was that in most cases involving monetary claims, instead of attempting to convince their clients to limit their claims to some extent, his law firm would opt for declaratory relief and plan to follow it with individual claims. The 2017 amendment clarified that in declaratory relief suits, while the claim document must provide information that monetary claims are the ultimate aim, there is no need to provide the exact amounts (the new article 6.1a).

### **Single or Multi-stage process**

There are four distinct stages in the class action procedure. Below is the analysis of the stages as regulated currently, before the 2017 amendment.

The first stage starts with a lawsuit brought by a class representative (with the mandatory legal representation). The court notifies the defendant of the lawsuit, and considers whether all the requirements (mentioned above) have been met and thus whether the class action can be certified (this complies with Recommendation no. 8). It is also during this stage, and more precisely at the time of the first procedural activity (which in most cases would be the response to the suit), that the defendant can ask for security for costs (see below, in the ‘Costs’ section). Lawyers dealing with class actions in Poland reported that this first stage is the longest, most costly and complex.<sup>635</sup> The decision to certify a class action, which can be appealed, concludes the first stage. The decision contains information about the action, the class representative, arrangements concerning remuneration of lawyers, and the names of class members who joined so far.

After the decision becomes final (either it has not been appealed or the appeal did not succeed), the court coordinates activities aimed at notifying all potential class members of the class action: by placing information in national or in regional press. It can also decide that no further notification is required if all potential claimants joined the class already. The second stage focuses on these activities within the time period set out by the court for joining the class. After the time limit passes, the court formally confirms who the class consists of. The decision can be appealed by the defendant, questioning class membership of specific persons. Currently, no proceedings on the substance of the case can commence until this appeal has been addressed by a final decision.

After the decision completing the previous stages becomes final, the third stage: the proceedings concerning the substance of the case, begins. The proceedings are concluded by a judgement on substance as well as a decision on costs.

The fourth and final stage, after the judgement becomes final, is enforcement. The judgement, naming all class members and specifying their

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<sup>635</sup> I. Gabrysiak, “Postepowanie sadowe w polskim prawie”, 2014

claims and the amount of damages due to them (if any), is the execution title.

The current structure of the proceedings, including a number of possibilities for the parties to delay proceedings, was criticised very heavily. The first two stages take what many commentators consider as a disproportionate amount of time.

The class action against M Bank (previously: BRE-Bank) illustrates the problems with the non-flexible, formalistic structure of class action proceedings (this case is analysed further below, in the Case Reports section; it is still ongoing).

***Here is the timeline:***

20 December 2010 – class action lawsuit brought before district court

6 May 2011 – district court certifies class

28 September 2011 – appeal court denies the defendant’s appeal against certification – certification final

28 December 2011 – the district court issues a decision on the text of the public announcement and its placement in Gazeta Wyborcza (a daily newspaper)

31 January 2012 – publication of the announcement in Gazeta Wyborcza

6 September 2012 – decision of the district court confirming the final membership of the class

29 November 2012 – the court of appeal denies the defendant’s request for security for costs (formalities officially completed – start of the substantive part of the proceedings)

16 June 2013 – the first substantive hearing

3 July 2013 – first instance decision in favour of claimants

30 April 2014 – the court of appeal confirms the first instance decision.

Thus, it took 30 months from when the case was brought for the first hearing on the substance to take place. The whole procedure from bringing the case to the court of appeal decision took 40 months. When compared with the average district court case length of 7.8 months this is striking, even considering that class actions are normally more complex than litigation in individual cases.

In fact, this case is still being considered, as the Supreme Court, in cassation proceedings brought by BRE Bank, cancelled the judgement of the Court of Appeal and referred the case back to this court. The reason for cancellation was not related to aspects of the class action procedure but to the interpretation of substantive contract law.<sup>636</sup> See below.

The problem with the procedure currently is the formalistic regulation of the proceedings, and insufficient flexibility and discretion for judges conducting litigation in class actions. This issue, including the 2017 amendment aimed at reducing these problems, is examined directly below.

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<sup>636</sup> Supreme Court judgement of 14 May 2014, II CSK 768/14, <http://www.sn.pl/sites/orzecznictwo/orzeczenia3/ii%20csk%20768-14-1.pdf>



## **Case-management and deadlines**

As described above, class actions progress through district courts in four distinct stages regulated in a very formalistic manner. Judicial case management and discretion do not feature strongly in the current Act. The 2017 amendment is aimed at making the structure more flexible, allowing the court to control the progress of the case and prevent the parties or the current undue formalism from obstructing the smooth progress of the proceedings. Several amendments were introduced:

First, the court will no longer need to hold a separate hearing devoted to a certification decision. This decision will now be taken at a non-public session, at which the court will either decide to certify, or refuse to certify and thus reject the class action (article 10.1 and 10.1a). Before this session is held, the court will request that the defendant submit an official response to the claim.

Further, once the certification decision is final, the certification issue can no longer be considered again during the proceedings (this is unclear under the current Act) (the new article 10a). The certification decision as well as the decision to refuse certification can be appealed, and subsequently the cassation proceedings can be brought before the Supreme Court. In the amendment, the Supreme Court has been given the power to cancel the decision refusing to certify the class action, and by doing so also to certify the class (the new article 10b).

Currently, the court's decision finalizing the second stage of the proceedings (the decision finalizing the class) can be appealed, and the third, substantive stage cannot start before the appeal proceedings are completed with a final decision. The 2017 amendment makes it clear that the appeal on this issue does not suspend the proceedings. The new article 17.2a provides that immediately after issuing the decision the court must set the time for the hearing on the substance of the case or continue with the proceedings in some other appropriate manner.

## **Expediency (particularly in injunctive cases)**

The Act does not prescribe any specific steps ensuring expediency, but see the above remarks concerning the 2017 amendment toward increasing the smooth progression of the proceedings.

## **Evidence/discovery rules**

Rules concerning evidence and discovery are not included in the Class Actions Act. The ordinary evidential rules of the Code of Civil Procedure apply here. The Polish civil procedure does not encourage extensive discovery.

## **Interim measures**

The Act does not contain rules on interim measures. Again, the Code of Civil Procedure applies.

## **Court directed settlement option during procedure**

The Code of Civil Procedure requires judges to inform litigants about amicable ways to settle disputes, and in particular of mediation (article 210.1). According to the Class Actions Act, the Court may refer the parties to mediation at any stage of the proceedings (article 7 of the Act). The nature of mediation, however, prevents the court from getting directly involved in any

settlement negotiations. The negotiations will be voluntary, so will the settlement. The Act does not regulate any form of court-directed settlement.

Mediation is regulated in the Code of Civil Procedure, amended by the Act of 13 October 2015 on supporting amicable methods of resolving disputes. Currently, the court may refer parties to mediation at any stage of proceedings in all types of cases (article 183.8). The costs of mediation are included in the overall litigation costs that are apportioned to the losing party after the case is concluded (see below for the explanation of the operation of the 'loser pays rule' in Poland). Parties who unreasonably and contrary to the requirements of good faith refuse to engage in mediation may be required by the court to cover the costs of litigation that ensued as a result of this refusal (article 103.2). The latter provision does not alter the voluntary nature of mediation. It only applies when the party's conduct is deemed by the court to be unjustifiably unfair and disloyal.

According to the Code of Civil Procedure, the chief judge in the case should encourage the parties to settle the dispute, especially at the first hearing (Article 223). The settlement, if concluded, is attached to the official report of the hearing. The court will approve the settlement unless it is apparent from the circumstances that it is contrary to law or to the principles of social cooperation (the principles of social cooperation are a general clause quite prominent in Polish civil law, similar to the principle of good faith) (article 103.4).

### **In case of out of court settlements: judicial control**

See above.

## **3. Available Remedies**

### **a. Type of damages**

The types of damages available in class action proceedings are the same types of damages as are available generally in civil proceedings. They depend on the area of law involved and the types of damages allowed, especially under the Civil Code if it is a breach of contract, a tort or unjustified enrichment.

The general principle in Polish civil law is one of full compensation. Unless legal provisions or a contract between the parties specify otherwise, compensation ought to include redress of damage sustained and of the profits the victim would have achieved had the damage not occurred.<sup>637</sup> The Civil Code provides the general rules concerning redress of damage:

*"Damage shall be redressed, at the election of the injured person, either by restoration of the previous state of affairs or by the payment of an appropriate sum of money. If, however, restoration of the previous state of affairs is impossible or if it would entail undue hardship or excessive costs to the person liable, the injured person's claim shall be limited to a pecuniary payment" (art. 363.1 of the Civil Code).*

Polish civil law provides for redress of pecuniary and non-pecuniary damage. While pecuniary damage is redressed according to the principles established

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<sup>637</sup> article 361.2 of the Civil Code; for a more detailed analysis see E. Baginska, M. Tulibacka, "Poland", in *International Encyclopaedia of Laws: Tort Law*, Edited by Ingrid Boone, Alphen aan den Rijn, NL: Kluwer Law International, 2014, pp. 147-168

in article 363.1 quoted above, non-pecuniary damage can only be compensated in cases when law permits such redress. Non-pecuniary damage can be redressed in personal injury cases, including by family members of persons who died as a result of personal injury, when other personal interests have been infringed (such as privacy or dignity), when someone was deprived of personal liberty, in cases involving infringements of patients' rights, in sexual assault or misconduct cases, in some other areas of criminal law, as well as in election law, copyright law and patent law.<sup>638</sup>

**b. Allocation of damages between claimants for compensatory claims/ distribution methods**

As mentioned above, in order to bring monetary claims in a class action, class members must standardise their claims with the rest of the class, or at least in a sub-class of at least 2 people. This constitutes an exception from the principle of full compensation: some class members will not receive such full compensation.

Despite allowing compensation of monetary claims in class actions, Polish law does not recognise the concept of collective damage. Each class member is awarded damages due to him or her individually in the judgement concluding the case.<sup>639</sup>

**c. Availability of punitive or extra-compensatory damages and their conditions**

No punitive damages are allowed in Polish civil law.

**d. Skimming-off/ restitution of profits**

The principle of full compensation explained above means that profits that a party gained as a result of a breach of contract, a tort, and other infringements, are not taken into account when assessing the damages due to the other party.

**e. Injunctions**

As mentioned above, class actions can concern a request to stop certain conduct, either together with monetary claims or by themselves.

**f. Possibility to seek an injunction and compensation within one single action**

See above.

**g. Possibility to rely in an injunction in separate follow-on individual or collective damages actions**

Polish Class Actions Act allows injunction claims (where the claims concern a request to stop certain activity or activities) or liability-only (declaratory

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<sup>638</sup> E. Baginska, M. Tulibacka, "Poland", in *International Encyclopaedia of Laws: Tort Law*, Edited by Ingrid Boone, Alphen aan den Rijn, NL: Kluwer Law International, 2014, pp. 149-154

<sup>639</sup> E. Baginska, M. Tulibacka, "Poland", in *International Encyclopaedia of Laws: Tort Law*, Edited by Ingrid Boone, Alphen aan den Rijn, NL: Kluwer Law International, 2014, p. 147

relief) claims. As mentioned above, the amended Class Actions Act requires that, in declaratory relief cases, the monetary claims that class members shall be seeking later should be listed in the claim form, albeit there is no obligation to provide precise amounts (the new article 6.1a). The judgement concluding a declaratory relief class action may be used in further individual litigation or ADR proceedings seeking individual redress. After the amendment, the judgement will need to contain a list of issues that are common to the class and that are the basis for subsequent individual monetary claims by class members (the new article 2.4 of the Act).

#### **h. Limitation periods**

The Class Actions Act does not prescribe any specific limitation periods for actions. The normal limitation periods as regulated by substantive law (especially the Civil Code) apply.

### **4. Costs**

#### **a. Basic rules governing costs and scope of the rules**

The Class Actions Act sets the court fee for lodging the case at 2% of the value of the claim (not lower than 30 PLN and not higher than 100.000 PLN), which is lower than in most other types of litigation and yet may be a high amount considering the potentially high numbers of people involved. In cases where a regional consumer ombudsman is a class representative, the court fee is waived.

Other costs of class actions are the costs of legal representation (lawyers' fees). In Poland the fees for barristers (*adwokaci*) and solicitors (*radcy prawni*) are determined by contract with the clients. Polish lawyers normally charge an hourly fee, or a per-task sum of money, agreed in advance with clients. Sometimes these fees are supplemented by an additional amount if the case takes more time than planned or is very complex. Further, they can also be complemented by a small percentage of the money recovered (success fee) (on the specifics of fee arrangements in class actions see below).

#### **b. Loser Pays Principle (and exceptions from it)**

The 'loser pays' rule, albeit modified to include a tariff for lawyers' fees and some judicial discretion for awarding a percentage or even no costs to winner if the loser's circumstances call for it or if the winner behaved unreasonably during proceedings, applies to class actions. The 'loser pays' principle is regulated by Articles 98 and 108 of the Code of Civil Procedure of 1964.<sup>640</sup> Article 98 of the Code specifies that only necessary, reasonably incurred costs will be awarded to the winning party. The court determines which costs were indeed necessary and reasonably incurred. There are a number of exceptions from the full application of the loser pays rule, as established by the Code of Civil Procedure:

If a party only partly won the case, costs may be apportioned equally or proportionately between the parties (article 100),

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<sup>640</sup> On the features and implications of the 'loser pays' principle in Poland see M. Tulibacka "Poland" in C. Hodges, S. Vogenauer and M. Tulibacka (eds.) "The Costs and Funding of Civil Litigation. A Comparative Perspective", Oxford: CH Beck; Hart, pp. 453 – 466, at p. 466

If the defendant accepted the claim immediately and did not prolong litigation, the court may request the claimant to cover the defendant's costs (article 101),

If specific circumstances justify it, the court may decide that the loser covers only part all none of the winner's costs (article 102),

The party who behaved unreasonably during litigation, for instance by unreasonably and against the requirements of good faith refusing to take part in mediation, the court may make an adverse costs order (article 103),

Settlement between the parties can apportion the costs equally or in some other manner (articles 104 and 105).

In practice, the tariff system for lawyers' fees and for experts' fees means that the winning party, even if awarded all the costs, may be left with irrecoverable costs.

In the context of success fees, even if the class won the case the lawyer will only be able to recover from the loser what the tariff system indicates. While it is likely that the court will award more than the minimum tariff (up to six times the minimum may be awarded), the amount may well remain much lower than the actual fee that was agreed. The remaining money will need to be covered by the class members.

## **5. Lawyers' Fees**

### **Availability (or not?) of contingency fees and their conditions**

As mentioned above, legal representation is a requirement – both for a class representative who is a class member and for a regional consumer ombudsman. In contrast to the rules of lawyers' ethics applicable to all types of litigation<sup>641</sup> which prohibit lawyers from charging success fees unless they are an addition to regular hourly or per-task fees, the Class Actions Act allows lawyers to agree to a success fee as the only form of remuneration. The Act allows lawyers representing the class to conclude no-win-no-fee arrangements, with the upper limit of their total remuneration being 20% of the value of the case (article 5).

It appears that in practice these types of agreements are extremely rare. There is anecdotal evidence of one such agreement having been concluded in a class action led by a sole practitioner. Another contingency fee arrangement was concluded in the Sandomierz flood case (handled by the law firm KKG, still on-going), but it was subsequently repealed and a new up-front fee was agreed. This change was triggered by the amendment of the claim: from a monetary claim of a number of sub-classes to declaratory relief only.

Lawyers in class actions prefer to use traditional cash remuneration. Many see class actions as too risky to invest in as the procedure has not yet been tested fully and the cost exposure for lawyers, especially in complex cases, is unknown. Thus, in a recent case against the investment company Amber Gold, the law firm of Chałas i Wspólnicy demanded an up-front fee the amount of which depends upon the amount claimed by each class member. It is estimated that the total loss to all investors exceeds 200 million PLN.<sup>642</sup> The

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<sup>641</sup> Paragraph 50.3 of the Barristers' Code of Ethics (Kodeks Etyki Adwokackiej), and Paragraph 29.3 of the Solicitors' Code of Ethics (Kodeks Etyki Radcy Prawnego)

<sup>642</sup> Gazeta Wyborcza, 31 August 2012, "Do gdańskiego sądu wpłynął pozew zbiorowy przeciwko Amber Gold",

law firm demanded between 3,3% and 9,8% of the value of each person's claim as remuneration payable up-front, in addition to collecting 2% of the value of each claim to cover court fees. Gazeta Wyborcza quoted information given by the law firm that if an amount up to 10,000 PLN is sought, the firm charges 984 PLN, and if it is an amount over 90,000 PLN, the lawyers' remuneration is 3,000 PLN.<sup>643</sup> For other amounts, some amount in between is charged. The class was divided into more than 100 sub-classes, claiming between a few thousand and a few hundred thousand PLN.

## **6. Funding**

### **a. Availability of funding**

The Class Actions Act does not allow class representatives to obtain legal aid (which in Poland consists of legal assistance nominated by court and a waiver of court fees). The only types of available funding are: contingency fee agreements (success fees) with lawyers (see above), and private funding. In fact, most cases are self-funded privately by each class member.

### **b. Origins of funding (public, private, third party)**

See above.

### **c. Conditions and frequency of resort to third party funding**

Third-party funding is not yet popular in Poland. I have no information about any such funding provided for class actions so far.

## **7. Enforcement of collective actions/settlements**

### **a. Framework for enforcement**

Judgements concluding class action proceedings must contain a list of all class members and, if they concerned monetary claims, the amount of compensation due to each class member (article 21). An excerpt from the judgement is an 'execution title' (*tytuł egzekucyjny*) for each class member (article 22). An execution title needs to be duly authorised by a court in order to become an execution title that can be used by the execution authorities (*tytuł wykonawczy*, the authorities include the bailiff).

If the case concerned non-monetary claims, execution commences upon the class representative's request. If the request has not been made within 6 months from when the judgement became final, any class member can make the request (article 23).

### **b. Efficient enforcement of compensatory/ injunctive order**

See above.

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[http://wyborcza.biz/finanse/1,105684,12400194,Do\\_gdanskiego\\_sadu\\_wplynal\\_pozew\\_zbiorowy\\_przeciwko.html](http://wyborcza.biz/finanse/1,105684,12400194,Do_gdanskiego_sadu_wplynal_pozew_zbiorowy_przeciwko.html)

<sup>643</sup> Gazeta Wyborcza, 24 August 2012, "Ile zarobią adwokaci na klientach Amber Gold", [http://biznes.gazetaprawna.pl/artykuly/642188,ile\\_zarobia\\_adwokaci\\_na\\_klientach\\_amber\\_gold.html](http://biznes.gazetaprawna.pl/artykuly/642188,ile_zarobia_adwokaci_na_klientach_amber_gold.html)

### **c. Cross border enforcement**

No specific rules on cross-border enforcement are contained in the Class Actions Act.

## **8. Number and types of cases brought/pending**

As of the end of 2016, 188 class actions were brought (amounting to the average of around 31 cases per year) in civil cases, and 7 in commercial cases. While this may seem like a significant number, one needs to put it in perspective: in 2015 the number of claims brought before civil courts in Poland was around 6.5 million. The most common defendants in class actions are: banks, other financial and insurance institutions, the state (specifically: local authorities), some internet-based service providers, and residential builders.

Of the 188 civil and 7 commercial claims, around 117 and 5 respectively were completed. 33 civil claims and all 5 commercial suits were rejected (refused certification because they did not meet the conditions set out by the Act), and 45 civil suits were returned because of various formal inadequacies. Only 38% of the civil claims actually went through the phase of substantive adjudication. A large number of those claims are still in the system. Only a handful have been concluded with final judicial decisions. Because there is no official register of class actions yet, it is difficult to find information about these decisions.

## **9. Impact of the Recommendation/Problems and Critiques**

In general, it is thought that the Act and the procedure it introduced were something of an experiment, and the experiment is not working as well as it was hoped. Indeed, some commentators even talked of the death of class actions in Poland and called for their resuscitation. The most significant problems were identified as:

- The limited scope of the Act and other strict certification criteria (exclusion of personal interests, standardisation requirements for monetary claims), some of which create barriers to bringing claims in cases where class actions would in fact be extremely useful
- Lack of flexible funding mechanisms (the conditional fee arrangements permitted by the Act are not used in practice)
- The formalistic and complex structure of the proceedings, with the first formal stage (certification) and the stage of class formation often lasting between 2 to 3 years

These problems, and the changes forthcoming after the 2017 amendments, were examined throughout this Report. While the 2017 amendment dealt with some of the weaknesses of the system, it is to be seen how the class action procedures will progress under the new rules. Some further problems, including the inconsistencies with the Recommendation, are mentioned below.

### **a. Consequences where no collective redress mechanism is available**

While the Polish Class Actions Act is relatively wide in scope, it does exclude some important areas of law and some types of claims, some of which seem

to be well suited for a collective procedure. In the context of the Recommendation these exclusions are problematic.

Indeed, some of the most significant criticism of the Class Actions Act concerns its limited scope. Lawyers acting for class members as well as scholars expressed the view that the scope of application of the Act was overly and unnecessarily limited, and there was a strong feeling that, in particular, labour law disputes ought to have been included.<sup>644</sup> On the other hand, employees are not always prevented from bringing class actions against their employers. If an action is not based on labour law provisions but on general tort law, a class action is possible.<sup>645</sup> The same reasoning applies to competition law claims or environmental law claims. It must be said here, however, that no class actions in these areas of law have been brought so far. The same reasoning applies to competition law claims or environmental law claims. It must be said here, however, that no class actions in these areas of law were brought so far.

The issue of exclusion of personal interests from the scope of the Act was already examined above, together with the 2017 amendment narrowing down this exclusion somewhat. In the context of the Class Actions Act, personal interests are key with regard to tort liability claims and product liability claims, perhaps less so in consumer law claims, which are more likely to be straightforward monetary claims. Personal injuries, infringements of personal freedom, dignity or name are the most common forms of losses in tort or product liability claims. Their exclusion from the scope of the Class Actions Act was therefore difficult to justify. This was particularly problematic with regard to personal injury: if all personal injury claims are excluded, what indeed is left in most ordinary product liability cases? While personal injury claims are going to be included when the 2017 amendment comes into force, other personal interests such as dignity or good name still cannot be sought in class actions.

It was quite clear that the Act was to some extent meant to be a test, and further areas would be included in future. The concern for the economy seems to have been an important factor, but once the debates around the class actions settled and there was a greater clarity on the potential impact of the Act, changes were almost certain. It is possible that further areas of law will be added in future.

**b. Impact of the collective mechanism (or lack of) on behaviour/policy of stakeholders (direct/ indirect, economic/social impact)**

I am not aware of any scholarly or policy papers concerning the impact of collective redress on the conduct of stakeholders.

**c. Incompatibilities with the Recommendation's principles**

The reasons for and the problems with limited scope were examined above.

Another incompatibility relates to the issue of class members/potential class members joining and leaving the class. The Recommendation suggests that, unless this undermines sound administration of justice, potential and actual

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<sup>644</sup> Professor A. Kubas of Kubas, Kos & Gaertner, in an interview, July 2012

<sup>645</sup> W. Ostaszewski, Rzeczpospolita, December 5, 2012 "Poszkodowani w wypadku przy pracy mogą wystąpić z pozwem zbiorowym" (those injured in the workplace can bring a class action) <http://prawo.rp.pl/artykul/792854,958037-Poszkodowani-w-wypadku-przy-pracy-moga-wystapic-z-pozwem-zbiorowym.html>



class members ought to be able to join the class and leave the class any time before the judgement is given or the case is settled (Recommendations no. 22 and 23). The Polish Class Actions Act, on the other hand, introduces very strict time limits, controlled by courts, on the ability to join and leave a class. As mentioned above, potential class members cannot join after the time limit for them to do so, set by the court in the information on commencement of the action, has expired (article 11.5). An exception was introduced in article 17.2, where a person who, before the class action is commenced, took action that could be part of the class action against the defendant, can join the class at any time before the judgement in the first instance is given. Further, leaving the class after the decision ultimately establishing the class has become final is impossible (article 17.3 after the amendment). According to some commentators, including the Helsinki Foundation's Report on class actions, this is not a point of concern. According to the Report, the Class Actions Act allows to precisely define the membership of the class in the interests of both parties, and eliminates the possibility of the defendant 'tempting' some class members out of the class with individual settlement offers.<sup>646</sup>

Further, one should agree with the same Report of the Helsinki Foundation, that the possibility of lawyers being paid on a contingency fee basis in the Polish class action procedure, albeit going against the Recommendation, is also not a concern because of a whole set of checks and balances instilled in the procedure, including its opt-in nature (ibid.).

**d. Problems relating to access of justice/fairness of proceedings including**

- Restrictions on access to justice negatively affecting collective redress
- Time and burden of collective actions on courts and parties compared to non-collective litigation
- Risks of and examples for abusive litigation
- Effective right to obtain compensation

With regard to access to justice and the effective right to obtain compensation, the formality and length of the proceedings in the first two stages, before the merits are considered, have been a significant problem in Poland. The review of the problems and of the changes introduced by the 2017 amendment was provided above. It is hoped that the changes will lead to greater efficiency.

Another problem affecting access to justice and effective compensation in Poland is the specific standardisation requirement for monetary claims, also explored above. This was not changed in the 2017 amendment.

Further criticisms that remained unanswered in the 2017 amendment relate to the limited scope of potential class representatives. No doubt this relatively limited scope of class representatives was aimed at strengthening the system of checks and balances for the procedure. Some argue, however, that prosecutors and non-governmental organizations should also be able to bring class actions. According to the Code of Civil Procedure, they can bring litigation in individual cases (prosecutors in any case, non-governmental organizations – in cases specified by legislation – article 68 of the Code of

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<sup>646</sup> M. Niedużak, M. Szwał, *Pozwy grupowe - doświadczenia po czterech latach*, Helsińska Fundacja Praw Człowieka, Warszawa, lipiec 2014, p. 9

Civil Procedure). Being able to bring class actions would be a natural extension of these powers. It is difficult to discern, looking at the preparatory work to the Act, why consumer ombudsmen were selected as the only allowed class representatives other than class members. Empowering a public official to bring class actions makes sense if that official provides an effective filtering process, and on the other hand assists those who might otherwise not be able to bring a class action. Expertise and experience are fundamental to meet both these goals. If it is expertise that the drafters of the Act meant to ensure, it is not exactly certain why consumer ombudsmen would be deemed to guarantee it to a greater extent than consumer associations or prosecutors.

## **II. Sectoral Collective Redress Mechanism(s)**

As mentioned above, actions for injunctions in consumer cases can be brought before the Head of the Office for the Protection of Competition and Consumers (they are regulated in the Act on the Protection of Competition and Consumers of 16 February 2007, as amended, published on 26 January 2017 (in Dziennik Ustaw of 2017, item 229; the original text was published in Dziennik Ustaw of 2007, nr 50, item 331). The Head of UOKiK has direct injunction powers in actions brought by anyone, including consumers, for the protection of collective consumer interests (these powers constitute implementation of the Consumer Injunctions Directive 98/27/EC, as codified by Directive 2009/22/EC, article 100 of the Act on the Protection of Competition and Consumers).

He or she also has injunctive powers in cases concerning unfair contractual clauses (article 99a of the same Act). The latter can be collective or individual cases.

Both procedures are administrative in nature, with the possibility of an appeal to the Court for the Protection of Competition and Consumers in Warsaw.

The consumer injunctions procedure can be commenced by anyone, including a foreign organization that is a qualified entity featured in the register of qualified entities as established by the Consumer Injunctions Directive (article 100 of the Act).

The unfair contractual clauses procedure can be commenced by a consumer, a consumer ombudsman, the Ombudsman for the Insured, and a consumer organization, including a foreign consumer organization that features on the list of organizations with the standing to bring such an action (the list is published in the Official Journal of the EU) (article 99a).

The consumer injunctions procedure includes a possibility of an interim decision by the Head of UOKiK, if it is probable that the conduct, if continued, may cause serious and irrevocable damage to the collective interests of consumers. This interim relief decision can remain in force until the final decision in the case is taken (article 101a).

The proceedings in both types of cases should not take more than 4 months, and in very complex cases – 5 months. If important consumer interests are at stake, the Head of UOKiK may give the final decisions the executive force.

### III. Information on Collective Redress

#### 1. National Registry

No national registry yet. It was announced in the 2017 amendment (the new article 11a of the Class Actions Act). The registry will be kept and updated by the Ministry of Justice.

#### 2. Channels for dissemination of information on collective claims

The statement on the commencement of the class action should be published in the popular national press, although there is also a possibility of publishing it only in regional press, depending on the circumstances. Further, the court may decide to not publish the statement if it is clear from the circumstances that all the potential class members already joined the class (the current article 11 of the Act). The manner in which the information requirements were regulated was criticised by judges and consumer ombudsmen, who argued that it was not cost-effective and did not include more flexible, cheaper and more accessible means of publication like the Internet.<sup>647</sup> In one case, it was reported that the cost of information (to be covered by the claimant) was 5,000PLN (about 1,200 Euro, *ibid.*). This is a high amount in Poland, and is particularly striking because publishing the same information online would be significantly cheaper.

The 2017 amendment made the requirements concerning publicity more flexible, allowing the judge to select the means of publication that are best suited to the circumstances of the specific case. The new article 11.3 allows the court to select the means of publication: including the official bulletin of the court, websites of the parties, or the national or local press.

Further, **the new article 11a requires that the Minister of Justice should publish information about all class actions in which the statement on the commencement has been issued (as well as all completed procedures)** in the official information bulletin of the Ministry. Courts are required to send information on proceedings where the statement was issued to the Ministry, and the latter should immediately update the bulletin. **No such information has been published yet by the Ministry.**

Looking for information on class actions (those contemplated and those already proceeding, as well as those completed with judgements) is a complex process at the moment. The register of all class actions mentioned above cannot come soon enough. Private parties and law firms have set up websites where this information is collected, either for the purposes of one particular action or a number of actions (these websites are for instance: [www.pozywamy-zbiorowo.pl](http://www.pozywamy-zbiorowo.pl), [www.pozywamybank.pl](http://www.pozywamybank.pl) and [www.pozew-zbiorowy.com](http://www.pozew-zbiorowy.com)).

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<sup>647</sup> Opinion of the Regional Consumer Ombudswoman for Warsaw M. Rothbert, quoted in M. Niedu-żak, M. Szwaś, *Pozwy grupowe - doświadczenia po czterech latach*, Helsińska Fundacja Praw Człowieka, Warszawa, lipiec 2014, p. 16

## IV. Case summaries

<p><b>1. Case name</b></p> <p>Cases are not given names in Poland. This was a case brought by a regional consumer ombudsman (in the name of 1247 consumers) against MBank (previously: BRE Bank)</p> <p><b>Reference</b></p> <p>II CSK 768/14, judgement of 14 May 2015</p> <p><b>Subject area</b></p> <p>Consumer law</p>	<p><b>Keywords</b></p> <p>Regional consumer ombudsman as class representative, mortgage loans amortised in Swiss Francs, unfair contractual clauses, breach of contract, standardisation of monetary claims, declaratory relief claim</p> <p><b>Summary of claims</b></p> <p>The class representative claimed that the bank used an unfair contractual term in its mortgage contracts. The mortgage was amortised in Swiss Francs. The clause allowed the bank to unilaterally adjust the mortgage interest rates depending on the "reference rate" for the particular currency, and taking account of changes in the financial parameters of the monetary and currency market in the country the currency of which is the basis for the adjustment. In the context of the mortgages amortised in Swiss Francs, the clause allowed the bank to change the rate of interest depending on LIBOR and other financial parameters of the Swiss market. While the bank was increasing the rates with the increases of LIBOR, when the latter started decreasing the rates were lowered, but this was done late and the amounts were disproportionately low. The class members claimed they were overcharged.</p>
<p><b>Dispute resolution method</b></p> <p>Group action</p> <p><b>Court or tribunal</b></p> <p>Supreme Court</p>	<p><b>Findings</b></p> <p><b>District Court (first instance):</b></p> <p>The requirement as to standardisation of monetary claims by class members could not be met, and thus the only type of claim that could be brought using the class action procedure was a declaratory relief claim.</p> <p>The bank used an unfair contractual clause. The clause does not bind consumers, while the rest of their mortgage contracts remains in force. The class members were overcharged on the mortgage interest rate by just over 1%.</p> <p><b>Court of Appeal (second instance):</b></p> <p>Rejected the bank's appeal. As a result of the unfair contractual clause's invalidity, the mortgage interest rate ought to remain fixed as from the date of the contract. As it was not fixed, the class members were overcharged.</p>
<p><b>Cross-border character/ implications, if any</b></p> <p>None</p>	
<p><b>Opt-in/out</b></p> <p>Opt-in</p>	
<p><b>Type of funding</b></p> <p>Private funding by class members</p>	
<p><b>Costs</b></p> <p>Loser pays, not finalized yet</p>	
<p><b>Abusive litigation</b></p>	

no	<p><b>Supreme Court (cassation):</b></p> <p>Use of an unfair clause does not automatically result in contractual liability of the bank. However, it may result in such liability if it leads to the party using the clause to obtain an undue benefit at the expense of the other party.</p> <p>The courts in both lower instances erroneously assumed that once the unfair clause is eliminated from the mortgage contracts, the interest rate ought to be fixed. Other clauses in the same contract indicate that it should not be fixed. Thus, the basis upon which contractual liability was confirmed and assessed was wrong.</p> <p>The case was referred back to the Court of Appeal. The Court of Appeal's costs decision based on the loser pays principle was annulled.</p> <p><b>Outcomes</b></p> <p>Settlement: [yes][no] NO</p> <p>Remedy: [injunction][damages][both] LIABILITY ONLY</p> <p>Amount of damages awarded: [in total]+[per claimant]+[as a % of amount claimed] NONE</p> <p>Distribution of damages</p>
<p><b>2. Case name</b></p> <p><b>Reference</b></p> <p>I CSK 533/14, decision of 28 January 2015</p> <p><b>Subject area</b></p> <p>Tort liability of public authorities</p>	<p><b>Keywords</b></p> <p>Tort liability of public authorities, claims for the protection of personal interests, claims with the same or similar factual basis, declaratory relief claim</p> <p><b>Summary of claims</b></p> <p>This case was another attempt to obtain compensation from the public authorities in charge of authorisation and supervision of buildings, for deaths, injuries and damages caused by the collapse of the Katowice Trade Hall. The first attempt was a class action brought by 16 victims and their families, and was rejected by the Court of Appeal in Warsaw in September 2011 (decision of 8 April 2011, II C 121/11), as it involved personal injuries and thus dealt with protection of personal interests.</p>
<p><b>Dispute resolution method</b></p> <p>[Group action]</p> <p><b>Court or tribunal</b></p> <p>Supreme Court</p>	<p>The present case was brought by families of those who died in the tragedy. They alleged that the General Building Supervisor and a number of other public and local authorities were liable for their monetary damages related to losing a close</p>
<p><b>Cross-border character/</b></p>	

<p><b>implications, if any</b></p> <p>None</p>	<p>family member. The legal basis for the claims was article 434 of the Civil Code on liability of the person in possession of a building for damage caused by its collapse.</p>
<p><b>Opt-in/out</b></p> <p>Opt-in</p>	<p>Because of the impossibility of standardization of the monetary claims of class members, as required by article 2.1 of the Class Actions Act, this was brought as a declaratory relief case.</p>
<p><b>Type of funding</b></p> <p>Private funding by class members</p>	<p><b>Findings</b></p> <p>Claims of family members concerning monetary damages caused by death, as long as they are related to lower standard of living as a result of death of a family member, are not claims for the protection of personal interests, but rather pertain to monetary interests. Earlier, both the District Court and the Court of Appeal took a different view, and they concluded that the class action could not be certified.</p>
<p><b>Costs</b></p> <p>Loser pays, not finalized yet</p>	<p>Both lower courts were wrong in refusing to consider the case as a class action. The decision of the Court of Appeal on refusing to certify a class action was annulled. The case was referred back to the District Court.</p>
<p><b>Abusive litigation</b></p> <p>no</p>	<p>The requirement that class members' claims must be based on the same or similar factual basis does not mean that the court ought to consider each case individually in order to consider all the factual circumstances including the necessary requisites of liability (such as fault, damage and causal link) before issuing a certification decision. The same or similar factual basis required for certification concerns the general basis of the claims (such as a catastrophe that caused death and injury).</p> <p><b>Outcomes</b></p> <p>Settlement: no</p> <p>Remedy: liability only</p> <p>Amount of damages awarded:</p> <p>Distribution of damages:</p>

# PORTUGAL – FACTSHEET

## **Scope**

No general collective redress mechanism

Sectoral: public health, environment, quality of life, protection of consumers, cultural heritage and public domain

The administrative code contains a provision

Both injunctive and compensatory

## **Standing** (Para. 4-7)

Any citizen in the enjoyment of their civil and political rights has standing, as well as associations or foundations whose purpose is to defend the interests at stake

## **Problems/Incompatibilities with Recommendation principles**

Standing is not solely granted to non-profit entities.

## **Admissibility** (Para. 8-9)

The admissibility of the claim is dealt with in the first stage of a collective action

## **Information on Collective Redress** (Para. 10-12, 35-37)

The law mandates the publication of the decision in at least two newspapers deemed to be read by those interested in the matter.

Costs are borne by the defendant.

## **Problems/Incompatibilities with Recommendation principles**

No national registry

## **Funding** (Para. 14-16)

Public funding is available under the general terms applicable to all processes and courts, with grounds in economic necessity.

The courts have no jurisdiction to regulate funding proposals.

## **Problems/Incompatibilities with Recommendation principles**

The parties are not required to disclose their source of funding

There is no provision specific to third party funding

## **Cross Border Cases** (Para. 17-18)

There are no specific rules or limitations as to the participation of foreign claimants.

## **Problems/Incompatibilities with Recommendation principles**

Opt-out is not restricted to in-jurisdiction claimants

## **Expedient procedures for injunctive orders** (Para. 19)

Conservatory and temporary measures may be decided, under the general rules of the Civil Procedure Code.

## **Efficient enforcement of injunctive orders** (Para. 20)

Decisions and settlements can be enforced in terms stipulated in general in Civil Procedure Code.

#### **Opt In/Opt Out** (Para. 21-24)

Opt-out system: the claimant represents, without the need for a mandate or express authorization, all the other holders of the rights or interests in question  
The Public Prosecutor is responsible for protecting the interests of the individuals.

#### **Problems/Incompatibilities with Recommendation principles**

If the party does not opt out within the term fixed by the judge, it is considered as an acceptance (although still possible to opt out until the end of the collection of evidence)

#### **Collective ADR and Settlements** (Para. 25-28)

The matters referring to the interests in question in the class actions can be referred to an ombudsman.

Where the parties agree, mediation and arbitration are also available.

#### **Costs** (Para. 13)

After the judgment, the claimant is exempted of any payment in cases of a favourable (even in a partially favourable) judgment.

Otherwise, costs are decided by the court, taking into account the economic situation of the claimant and ground for the judgement

#### **Lawyers' Fees** (Para. 29-30)

Contingency fees are prohibited.

#### **Prohibition of punitive damages** (Para. 31)

Extra-compensatory damages are not available.

#### **Collective Follow- on actions** (Para 33-34)

No collective follow on actions.

#### **Interplay between injunctions and compensation across all sectors**

It is possible to seek both an injunction and compensation in the same action.



# PORTUGAL – REPORT

## I. General Collective Redress Mechanism

### 1. Scope/ Type

*Acção popular* (popular action), regulated by Law 83/95, of August 31st is a horizontal collective redress mechanism. The mechanism is both injunctive and compensatory.

### 2. Procedural Framework

#### a. Competent Court

The competent court depends on the nature of the dispute. If administrative rules are applicable, administrative courts are competent. If the conflict is regulated by private law (in a very broad sense), the civil courts are competent.

#### b. Standing

Any citizen in the enjoyment of their civil and political rights has standing, as well as associations and foundations that defend the interests referred to above, regardless of whether or not they have a direct interest in the dispute (e.g. Associação Portuguesa para a Defesa do Consumidor (DECO) (Portuguese Association for Consumer Protection), Quercus - Associação Nacional de Conservação da Natureza (National Association for Nature Conservation)). This is also stated by Article 31 of the Civil Procedure Code.

#### c. Availability of Cross Border collective redress

Foreign parties are permitted engage in collective redress. There are no specific rules applicable to foreign parties.

#### d. Opt In/ Opt Out

The Portuguese popular action is fundamentally an opt-out system. This is set out in Articles 14 and 15 of Law 83/95, of August 31st. However, opt-out proceedings are only binding on in-jurisdiction claimants and claimants from other jurisdictions must chose to opt-in to the proceedings.

The claimant represents and may act on behalf of the group affected without the need for a mandate or express authorization. Following the initiation of the procedure by the claimant, the interested parties are notified and they must, within the term fixed by the judge:

- (a) intervene in the main proceedings;
- (b) declare whether they agree to be represented by the claimant; or
- (c) declare that they do not agree to be represented by the claimant and thereby exclude themselves from representation, in which case, the final decision will not be applicable to them.

Where an interested party does not respond to the notice within the permitted period, they are considered to have accepted the claimant's

representation. Nevertheless, representation can be expressly refused by interested entities until the end of the collection of evidence, or equivalent stage.

The Public Prosecutor (*Ministério Público*) is responsible for protecting the interests of the individuals represented by the claimant and the legality of the proceedings. Under Article 16, no.3 of Law 83/95, of 31 August, it has the power to replace the representative claimant where it withdraws from the proceedings or in instances where its conduct is harmful to the interests at stake.

#### **e. Main procedural rules**

Admissibility and certification criteria: There are no provisions on certification in the Law 83/95, of August 31st. The claimant represents all parties interested in the process. However, under Article 13 the judge may dismiss the action if, following consultation with the public prosecutor and the completion of any preliminary inquiries, it is considered highly improbable that it will succeed. Both the public prosecutor and the claimant may request preliminary inquiries or they may be made of the court's own initiative.

Single/multi stage procedure: Civil popular action takes "(...) any of the forms provided for in the Civil Procedure Code" (Article 12, no. 3 of Law 83/95, of August 31st). The action is, therefore, declaratory, condemnatory or constitutive (Article 4, no. 2 of the Civil Procedure Code) depending on the interests involved. After the publication of Law 41/2013, June 26, which entered in to force on September 1, 2013, there is a single form for the declarative processes. The main phases are as follows:

1. Petition;
2. Defence;
3. Reply (by the plaintiff only in case of counterclaim);
4. Preliminary hearing;
5. Final hearing;
6. Decision.

All these phases are equally applicable to a collective redress action.

Evidence/discovery rules: As far as the Portuguese system is concerned, the most important stage is the *audiência de discussão e julgamento* (final hearing with oral discussion), conducted by the judge or judges. This includes the taking of evidence and also applies for the popular action. Nevertheless, Article 17 of Law 83/95, of August 31st states that within the range of the fundamental questions defined by the parties, the judge is responsible for his own enterprise on collecting evidence, and not being obliged by the will of the parties.

Control in case of settlement: Settlement is actively encouraged by the judge at every stage of the proceedings and, in particular, during the preliminary hearings. Furthermore, a preliminary hearing may be convened specifically for the purpose of facilitating settlement between the parties.

Whilst there is no court control over the settlement discussions between the parties the Public Prosecutor may replace the claimant where it is deemed to be acting in a way which is harmful to the interests at stake. This may include an unfavourable settlement or settlement discussions.

### **3. Available Remedies**

The full range of remedies available under the Code of Civil Procedure are also available in a group action. This includes both compensatory damages and injunctive orders as well as declaratory judgments, punitive or non-compensatory damages however, are not recoverable. Civil liability for compensatory damages may be based on fault but can also be awarded regardless of fault where, for example, the conduct derives from a dangerous activity. According to Article 22 of Law 83/95, of August 31st, group members are entitled to receive compensation under the general liability rules within three years of the judgment with any unclaimed amounts revert to the Ministry of Justice.

Again, interim remedies may be obtained under the Code of Civil Procedure.

In addition, Article 25 of Law 83/95, of August 31st, states that the claimant in a popular action can make a claim to the Public Prosecutor (Ministério Público) and can also join criminal proceedings against the defendant.

### **4. Costs**

Preliminary costs are not demanded against the claimant. Following judgment, the claimant is exempted from any payment where there has been a favourable or even a partially favourable judgment. In cases where there is a no favourable judgement, costs are decided by the court, up to a maximum of 50% of regular costs, taking into account the economic situation of the claimant and the grounds for the unfavourable judgement.

### **5. Lawyers' Fees**

Contingency fees are not allowed under the Portuguese legal system (article 106 of the Bar Association Statute, approved by Law 145/2015, of September 9th).

### **6. Funding**

The starting point for funding in Portugal is that it must be provided by the claimant either out of its own funds or using the resources of the individual group members themselves. Third party funding is not regulated, and although it is not prohibited it is rarely used in practice and is seldom available.

Public funding, however, is available under the general terms applicable to all processes and courts, where the defendant can show grounds for economic necessity. (Law 34/2004, of July 29th). For the purposes of this law 34/2004, of July 29th, a party is in economic insufficiency where, having regard to the income, wealth and permanent expenditure of his household, it has no objective conditions to support the costs of a judicial procedure.

Funding control is public and carried out by the Portuguese Social Security public institute (Instituto da Segurança Social). All applicants that have their funding rejected by Social Security may review that administrative decision in the Administrative Courts. The Court where the action is being conducted has no jurisdiction to approve or reject funding proposals itself..

## **7. Enforcement of collective actions/settlements**

There are no specific rules regarding the enforcement of collective actions and settlements and as such these fall to be enforced under the rules specified in the Code of Civil Procedure. Under the general rules, judicial decisions are considered sufficient title for enforcement. Therefore, where a judgment following a class action defines an amount to be paid by the defendant(s), their patrimony may be apprehended and sold by the Court in order to satisfy the judgment debt.

## **8. Number and types of cases brought/pending**

Information not available.

## **9. Impact of the Recommendation/Problems and Critiques, including**

### **a. Consequences where no collective redress mechanism is available**

Not applicable.

### **b. Impact of the collective mechanism (or lack of) on behaviour/policy of stakeholders (direct/ indirect, economic/social impact)**

Not applicable.

### **c. Incompatibilities with the Recommendation's principles**

Portuguese legislation is incompatible with the recommendation in two respects:

Firstly, the popular action in Portugal is based on an opt-out system whereas paragraph 21 of the commission recommendation states that the claimant party should be based on an opt-in principle.

Secondly, in Portugal standing is granted not only to non-profit entities whereas paragraph 4(a) of the recommendation requires representative parties to have a non-profit making character.

### **d. Problems relating to access of justice/fairness of proceedings including**

Nothing to report

## **II. Sectoral Collective Redress Mechanism**

### **A. Consumer law**

#### **1. Scope/ Type**

Article 12 no. 4 and 5 of Law 24/96, of July 31st, stipulates that the consumer has the right to receive compensation for patrimonial damage or non-patrimonial damage caused by defective products or services.

## **2. Procedural Framework**

### **a. Competent Court**

Civil courts.

### **b. Standing**

Article 13, b) and c) of Law 24/96, of July 31<sup>st</sup> grants standing to consumers and consumers' associations although not directly injured, under the terms of Law 83/95, of August 31<sup>st</sup>, to the Public Prosecutor (*Ministério Público*) and the Institute for the Consumer.

### **c. Availability of Cross Border collective redress**

There are no particularities to report.

### **d. Opt In/ Opt Out**

The same system as in popular action.

### **e. Main procedural rules**

The same rules as in popular action.

## **3. Available Remedies**

The same as described for popular action. Also, according to Law 24/96, of July 31<sup>st</sup>, injunctions may be ruled by the Court, for the prevention, correction or cessation of practices which are harmful to the rights of consumers, including the prohibition of using general contractual terms

## **4. Costs**

The same rules as described for popular action.

## **5. Lawyers' Fees**

The same rules as described for popular action.

## **6. Funding**

The same rules as described for popular action.

## **7. Number and types of cases brought/pending**

Information not available.

## **8. Impact of the Recommendation/Problems and Critiques, including**

### **a. Consequences where no collective redress mechanism is available**

Not applicable.

### **b. Impact of the collective mechanism (or lack of) on behaviour/ policy of stakeholders (direct/ indirect, economic/social impact)**

Not applicable.

### **c. Incompatibilities with the Recommendation's principles**

The same, as described for popular action.

### **d. Problems relating to access of justice/fairness of proceedings including**

Nothing to report

## **B. Financial Market Law**

### **1. Scope/ Type**

Decree-Law 486/99, of November 13th, approved the Securities Code. Articles 31 and 32 stipulate the possibility of using the popular action for the protection of homogeneous individual interests or collective interests of investors in securities.

### **2. Procedural Framework**

#### **a. Competent Court**

Civil courts.

#### **b. Standing**

Claims may be brought by non-institutional investors, associations for the protection of investors and foundations whose purpose is the protection of investors in securities.

For an association to have standing they must have the protection of the interests of investors in securities as the principal goal of their functioning. In addition, they must also have at least 100 members who are natural persons, and who are not institutional investors. An organisation must have been in operation for more than a year, as stipulated by article 32 of Decree-Law 486/99, of November 13th.

#### **c. Availability of Cross Border collective redress**

There are no particularities to report.

#### **d. Opt In/ Opt Out**

The mechanism is opt-in, as described above for the popular action.

**e. Main procedural rules**

The same rules as in popular action.

**3. Available Remedies**

The same as described for popular action.

**4. Costs**

The same rules as described for popular action.

**5. Lawyers' Fees**

The same rules as described for popular action.

**6. Funding**

The same rules as described for popular action.

**7. Number and types of cases brought/pending**

Information not available.

**8. Impact of the Recommendation/Problems and Critiques, including**

**a. Consequences where no collective redress mechanism is available**

Not applicable.

**b. Impact of the collective mechanism (or lack of) on behaviour/policy of stakeholders (direct/ indirect, economic/social impact)**

Not applicable.

**c. Incompatibilities with the Recommendation's principles**

The same, as described for popular action.

**d. Problems relating to access of justice/fairness of proceedings including**

Nothing to report

**C. Environmental Law**

**1. Scope/ Type**

Under Article 45 of Law 11/87, of April 7th (Framework Law on the Environment), the protection of environmental values may be achieved using popular action and all its instruments and rules.

## 2. Procedural Framework / Costs / Funding

Actions in environmental cases are conducted according to the framework set out above in relation to the Popular Action. The same rules on costs and funding of proceedings apply.

## III. Information on Collective Redress

### 1. National Registry

Not available

### 2. Channels for dissemination of information on collective claims

Not available

## IV. Case summaries

<b>Case</b> <i>"Dulce Pontes Bizet's Carmen"</i>	<b>Summary</b>
<b>Subject area:</b> <b>Consumer law</b>	In 1998, several 'outdoors' and newspapers publicized the show "Bizet's Carmen," with singer Dulce Pontes main interpreter to act in a rotating stage at Campo Pequeno in Lisbon. The show ended up being performed by the London Philharmonic Orchestra, who played some excerpts from opera, in a stage was not rotating.
<b>Court</b>	Hundreds of spectators found themselves defrauded when. After the refusal of the promoter of the show to return the money from tickets, the Court gave reason to the claimant, DECO (Portuguese Association for Consumer Protection).  After 'res judicata' (in 2006), consumers should to Portugal Meydis Advertising Direct a registered letter and a copy of the ticket for refund.

<b>Case</b> <i>"Opening School"</i>	<b>Summary</b>
<b>Subject area:</b> <b>Consumer</b>	In 2002, DECO has received numerous complaints from consumers who faced the closure of Opening School (School of English), teaching in various parts of the country, leaving about 1,200 students without the possibility to continue their studies.



<b>law</b>	When registering, Opening School, had a contract with two payment options: immediate or by entering into a contract of consumer credit (provided by BBVA Finanziamento) which, when executed, remained in force despite the closure of this school.
<b>Court</b>	<p>In 2010, the Supreme Court of Justice (STJ) gave reason to DECO ruling against Opening Scholl and BBVA Finanziamento and determining these institutions to reimburse consumers.</p> <p>It was not necessary to reinforce the decision due to a settlement agreement between DECO, Opening Scholl and BBVA Finanziamento.</p> <p>DECO provided templates of letters for consumers to claim refund.</p>

<p><b>Case</b> <b>"Digital Terrestrial Television (DTTV)"</b></p> <p><b>Subject area:</b> <b>Consumer law</b></p>	<p><b>Summary</b></p> <p>DECO enacted in Lisbon Administrative Court an action against ANACOM - National Communications Authority, due to damage caused to consumers by failures in the process of transition from analog television signal for Digital Terrestrial Television (DTTV).</p> <p>Damage arising from the fact that ANACOM has not fulfilled the duties he was responsible in planning, monitoring and overseeing the implementation of DTTV to ensure the continuity of the television signal.</p> <p>DECO petitioned a global amount of 42 million euros to compensate consumers affected.</p>
<b>Court</b>	

# ROMANIA – FACTSHEET

## **Scope**

No horizontal mechanism but procedural mechanisms of co-participation and voluntary intervention available. A sectoral mechanism in consumer law is available and allows **injunctive** relief only.

## **Standing** (Para. 4-7)

Representative consumers associations ("RCPA") can bring legal actions in order to defend the legitimate interests and rights of the consumers. RCPA must have a minimum of 3000 members in at least 10 counties and an activity on behalf of the consumers of at least 3 years.

Public Prosecutor in Public Ministry also empowered to join consumer actions

## **Admissibility** (Para. 8-9)

Court determines whether the statutory eligibility requirements have been met. Legal actions must satisfy the normal requirements for any legal action: legal capacity and legitimate interest.

## **Information on Collective Redress** (Para. 10-12, 35-37)

Information available on collective redress actions by individual parties and through court websites.

## **Problems/Incompatibilities with Recommendation principles**

No national registry

## **Funding** (Para. 14-16)

No regulation of third party funding. Limited funding comes from state via aid to persons in financial difficulty. Court has no authority to limit or condition funding, especially since this is expected to be a confidential matter of the plaintiffs.

## **Problems/Incompatibilities with Recommendation principles**

No framework for the provision of funding. Law falls short of the Recommendation, in particular points 14, 15, 16 and 32

## **Cross Border Cases** (Para. 17-18)

Cross border relief is possible, where the locus standi is in a different jurisdiction

## **Expedient procedures for injunctive orders** (Para. 19)

Courts empowered to give preference and to accelerate the hearing of cases where it is about abusive clauses, especially in the banking and financial sectors. The deadline to complete a case in all the degrees of jurisdictions is between 2 to 4 years.

## **Efficient enforcement of injunctive orders** (Para. 20)

The plaintiffs may seek from the court to order interim measures consisting of freezing certain assets/bank account of the defendants to secure payment of damages, if this will be awarded by the court at the end of the court case.

## **Opt In/Opt Out** (Para. 21-24)

Opt-in by voluntary intervention. Conditions prescribed by law, supplemented by discretion of the judge.

## **Collective ADR and Settlements** (Para. 25-28)

If the plaintiffs are also companies, the court may ask the parties to find an amicable settlement of their dispute and give a term for reaching a settlement.

#### **Costs (Para. 13)**

Loser Pays Principle applies but the court may order a reduction of the lawyers' fees to be paid, if these are deemed excessive. Claims introduced by the RCPAs are exempted from the payment of stamp duties.

#### **Problems/Incompatibilities with Recommendation principles**

The fact that the victims must pay upfront the stamp duties and all the legal costs may in practice act like a break on the actions they introduce in order to receive compensation. The judicial aid lack sufficient resources in order to ensure that this gap is covered by the State.

#### **Lawyers' Fees (Para. 29-30)**

Contingency fees are, as a matter of principle, prohibited by the Lawyers Statutes. However, success fees are becoming frequent and can be used to circumvent the prohibition.

#### **Problems/Incompatibilities with Recommendation principles**

No control over the rise/use of success fees

#### **Prohibition of punitive damages (Para. 31)**

Punitive damages or extra-compensatory damages not available.

#### **Extra-compensatory damages and their conditions**

In case of joint actions introduced by undertakings, the compensation would include the non-realised profit (lucrum cessans), in addition to the effective damage (damnum emergens).

#### **Collective Follow- on actions (Para 33-34)**

Individual actions for damages start after final injunction order in consumer cases. Co-participation mechanism used in such cases.

#### **Interplay between injunctions and compensation across all sectors**

It is possible to seek an injunction and compensation in a single action. However, the injunction is of an interim nature.

# ROMANIA – REPORT

## I. General Collective Redress Mechanism

### 1. Scope/ Type

The Romanian Civil Procedure Code (“RCPC”) provides legal mechanisms allowing multiple participation in court cases, under the term of “co-participation in the case” (articles 59-60 of RCPC) and, respectively, the “voluntary intervention in a case” (articles 61-67 of RCPC).

#### a. Co-Participation

According to article 59 of RCPC: *“Several persons may be together plaintiffs or defendants if the case refers to a common right or obligation, if their rights or obligations have a common cause or if between these there is a close connection”*. The common cause or close connection refers to situations where the claim originates in the same set of facts or legal actions. For instance, when more persons are harmed by an identical or very similar behaviour of one and the same perpetrator. The provisions have been extensively used in the past and provided significant assistance to victims seeking relief for the damages they suffered. The courts themselves favour such cases, as it reduced the number of parallel and redundant cases and, hence, the workload of the judges. However, the co-participants preserve their individuality and only the procedural acts performed by a party which protect the interests of other parties to the case are opposable to them. This provision is intended to assist plaintiffs who have been rather passive in the court proceedings, whilst preserving their right of defence. The underlying rationale for such a provision is that the right of defence is individual and it should preserve this character even in situations of co-participation, justified mainly by reasons of procedural efficiency.

#### b. Voluntary Intervention

The voluntary intervention may be a main intervention, in support of the rights of its author, or ancillary, in support of the main plaintiff. Virtually any claim can be supported this way, save for very limited situations, such as certain family claims. The voluntary intervention is only admissible until the moment when the first court solved all the preliminary exceptions raised by the parties and is in position to hear the pleadings but the judge may still decide to be settled in a separate case if it may cause delays in the proceedings. In taking its decision, the judge is obliged to balance the interests of each of the parties and the need to ensure that a decision is issued within a reasonable period.

Please note that both types of interventions are less frequent in relief or injunction applications and they are rather used in cases in which substantial claims are settled – the main cases.

In practice, both the co-participation and the voluntary intervention are used extensively, including in cases where there have been a large number of plaintiffs – up to tens of thousands – but such cases are difficult to handle by the courts. In the past, the proceedings in such cases were long and complicated but in the current civil procedure, the mission of the judge is

simplified by a few procedural innovations he disposes of, such as the possibility to appoint a trustee attorney for more plaintiffs or defendants in a case.

## **2. Procedural Framework**

### **a. Competent Court**

The co-participation and the voluntary intervention are possible in front of the courts hearing cases in the first instance and are not permitted in the appellate courts – the Courts of Appeal and the High Court of Justice.

### **b. Availability of Cross Border collective redress**

Not applicable.

### **c. Opt In/ Opt Out**

The only available possibility is for plaintiffs to join claims, through individual and express requests, approved by the court – the voluntary intervention, as explained above. There is no opt-out option, although certain procedural acts of a party to a case may be undertaken on behalf of the co-participants, if it is considered beneficial to the later. The judge must balance the goal of procedural efficiency and the interests of the parties. For instance, the judge may refuse a plaintiff from joining a claim if his/her intervention would cause long delays of the case and the intervention is not likely to bring more evidence and clarity to the matter heard by the judge.

Claimants may leave the proceedings until a decision is issued by the judge.

### **d. Main procedural rules**

#### **Admissibility and certification criteria**

The legal actions must satisfy the normal requirements for any legal action: legal capacity and legitimate interest. The legitimate interest refers to the requirement that a person must show, prima facie, that it has a right that it aims to preserve or defend by joining a certain court case.

#### **Single or Multi-stage process**

The cases are subject to appeal and sometimes to a recourse in front of a higher court: the court of appeal or the High Court of Justice. All the cases are subject to at least an appeal and in certain conditions a second appeal – and hence, third degree – is possible. The second appeal is possible for cases which are heard in first instance by the lower courts (the local courts and the county tribunals). In addition, for procedural errors, extraordinary appeals may be brought against definitive decisions of the courts.

#### **Case-management and deadlines**

The judge has a statutory duty to have an active role and instruct the parties throughout the proceedings. The deadline to complete a case in all the degrees of jurisdictions is between 2 to 4 years but the actions brought under Law 193/2000 may take less time, as judged tend to give priority to such cases, given their impact in the society.

### **Expediency (particularly in injunctive cases)**

Courts tend to give priority and to accelerate the hearing of cases where it is about abusive clauses, especially in the banking and financial sectors, given that these are often socially sensitive cases.

### **Evidence/discovery rules**

The usual procedural rule – *actori incumbit probatio* (the plaintiff must present evidence in support of its claim – applies. It means that any plaintiff must provide conclusive evidence in support of its claim in order to be successful.

### **Interim measures**

We are not aware of such situations.

### **Court directed settlement option during procedure**

The Civil Procedure Code provides that parties to a litigation may settle their matter, either in court (in which case the judge will issue a simplified decision, ratifying the agreement of the parties) or out-of-court. If the claim is settled in front of the judge, the court will issue what is referred to as “expedient decision” – a simplified decision ratifying the settlement and making it binding.

**In case of out of court settlements:** judicial control.

## **3. Available Remedies**

### **a. Type of damages**

Full recovery of damages incurred.

### **b. Allocation of damages between claimants for compensatory claims/ distribution methods**

According to the damage of each plaintiff. The damage awarded to each person must correspond to the loss effectively incurred by that person, including the loss of profit..

### **c. Availability of punitive or extra-compensatory damages and their conditions**

Not available

### **d. Skimming-off/ restitution of profits**

In case of joint actions introduced by undertakings, the compensation would include the non-realised profit (*lucrum cessans*), in addition to the effective damage (*damnum emergens*).

### **e. Injunctions**

Possibility to seek an injunction and compensation within one single action: Yes.

Injunctive actions may be brought separately but also together with the action for damages. Decisions issued in injunctive actions are only valid for a limited period of time and are conditioned by the introduction of a main substantial action, for the recovery of the damages produced. The decision issued in the injunctive action can only limit the damages from accruing until a final decision is issued in the claim for damages.

**f. Possibility to rely in an injunction in separate follow-on individual or collective damages actions**

Injunctions are limited in their duration and scope and never decide anything on the merits of the case. Hence, they use as a basis for follow-on individual or collective claims for damages is limited.

**g. Limitation periods**

The standard limitation period of 3 years applies. The period of limitation is of 5 years for the recovery of damages produced by the infringement of the competition rules (cartels and abuses of dominance). In the later cases, the period of limitation may be suspended during the time the parties attempt to find an amicable settlement of the claim but no more than 2 years since the ADR procedures are initiated.

**4. Costs**

**a. Basic rules governing costs and scope of the rules**

The plaintiffs must bear their costs in relation to the claims they bring to court. In special circumstances – lack of income or funds, social cases – may have their stamp duties entirely waived or they may receive approval to defer the payment of the stamp duties or to pay the duties in several instalments. When the actions are brought by companies, they may only defer the payment or receive approval to pay the stamp duties in instalments. The approval is issued by the judge, based on evidence regarding the lack of incomes. In the framework of the judicial aid, the individuals with very low incomes may also receive financial support to cover the fees of the lawyers or the experts, including in actions for damages.

**b. Loser Pays Principle (and exceptions from it)**

There are no exemptions to the principle “loser pays” but the court may order a reduction of the lawyers’ fees to be paid, if these are deemed excessive.

**5. Lawyers’ Fees**

**Availability (or not?) of contingency fees and their conditions**

Contingency fees are, as a matter of principle, prohibited by the Lawyers Statutes. On the other hand, success fees became frequent in the previous years and often they form a large part of the overall fees, which may amount to contingency fees, thus circumventing the prohibition.

## **6. Funding**

### **a. Availability of funding**

There are limited funding possibilities in the framework of the judicial aid, granted through the Ministry of Justice to individuals to persons in serious financial difficulty.

### **b. Origins of funding (public, private, third party)**

The funding comes mainly from own sources of the plaintiffs or from the public budget (through the judicial aid). There are no known situations of third-party funding but these are likely to exist.

### **c. Conditions and frequency of resort to third party funding**

Provision of third-party funding is not specifically regulated but such funding is not customary in the Romanian legal proceedings. There is no such funding from the financial institutions, such as banks.

### **d. Control of funders (Courts/Legislators/Self-regulation)**

In principle, the courts may have a say on this issue, by ordering a reduction of the legal costs that may be recovered by the winning party. Formally, the court has no authority to limit or condition such funding, especially since this is expected to be a confidential matter of the plaintiffs.

### **e. Claimant-Funder relationship**

The third-party funding does not have to be disclosed in court and, hence, it would be a confidential matter, governed by the agreement between the parties. Such funding may be either a simple reimbursable loan or a financing agreement based on which the lender would assume the risk of losing the case or receiving a lower amount of damages than that sought by the plaintiff.

## **7. Enforcement of collective actions/settlements**

### **a. Framework for Enforcement**

Enforcement of any court decision is done through the bailiffs, who are private practitioners entrusted with the public authority to enforce the court decisions. Injunctive orders are enforceable immediately after their issuance, even if subject to appeal, whilst decisions in actions for damages are enforceable only after the appeal phase.

### **II. Efficient Enforcement of compensatory/injunctive order**

The plaintiffs may seek from the court to order interim measures consisting of freezing certain assets/bank account of the defendants to secure payment of damages, if this will be awarded by the court at the end of the court case.

### **III. Cross border enforcement**

Decisions issued in the European Union are fully enforceable in Romania whilst decisions issued outside the EU may be enforced via an exequatur (reconnaissance) procedure.

## **8. Number and types of cases brought/pending**



No official statistics

## **9. Impact of the Recommendation/Problems and Critiques, including:**

### **a. Impact of the collective mechanism (or lack of) on behaviour/policy of stakeholders (direct/ indirect, economic/social impact**

The lack of a full-fledged collective redress mechanism in Romania is an obstacle to effective and efficient actions brought by consumers or victims of wrongdoings, from the victims of the pyramidal games to those of the infringements of the competition law.

### **b. Incompatibilities with the Recommendation's principles**

Although the Romanian Civil Procedure Code is of recent date, it does not include enough mechanisms and concepts aimed at facilitating multi-parties claims.

### **c. Problems relating to access of justice/fairness of proceedings including**

- Restrictions on access to justice negatively affecting collective redress

The fact that the victims must pay upfront the stamp duties and all the legal costs may in practice act like a break on the actions they introduce in order to receive compensation. The judicial aid lack sufficient resources in order to ensure that this gap is covered by the State. Injunctive reliefs have an easier burden, as NAPC and the RCPAs do not have to pay any stamp duties and the amount of such duties for private plaintiffs is low.

- Time and burden of collective actions on courts and parties compared to non-collective litigation

The duration of the litigation tends to be rather long (from 2 to 4 years, including the appeals), which may be a problem especially in the situation where preliminary injunctive relief is not issued by the courts. The main reason for the duration is that courts are overloaded with cases.

- Risks of and examples for abusive litigation

Abusive litigation is less of concern than litigation started to harass a certain company, which sometimes happens.

- Effective right to obtain compensation

Courts have the necessary expertise for granting full compensation and judges may be assisted by experts. The high number of cases that a panel of judges must hear every day reduces their ability to adopt relief measures in a timely and accurate manner.

## **II. Sectoral Collective Redress Mechanisms**

### **Consumer Law**

The representative consumers associations ("RCPA") can bring legal actions – injunctive relief - in order to defend the legitimate interests and rights of the consumers (art.37, letter h of Government Ordinance no.21/1992 ("GO 21/1992") regarding the consumers protection), In an injunctive relief action, the judge will not touch upon the substantial merits of the claim, but it would only asses if prima facie there is a possibility that damage occurred and may continue to accrue.

The closest legal action to a collective redress mechanism is the provision from Law 193/2000 regarding the abusive clause in the agreements concluded between professionals and consumers ("Law 193/2000"), which empowers the National Authority for the Protection of Consumers ("NAPC"), a public institution, to ask in court that the clauses deemed to be abusive are stroke out from all the agreements in which they are incorporated. No damages are awarded in such cases. Similar actions may be brought by the RCPAs, as these are defined by GO 21/1992 (see above). These provisions are the mere implementation in Romania of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. The decision obtained further to request of NAPC may be used in further claims for damages by the persons who may invoke that they were affected by the annulled clause.

#### **1. Procedural Framework**

##### **a. Competent Courts**

The courts competent to hear the actions brought on behalf of the consumers based on GO 21/1992 and on Law 193/2000 are the tribunals, as first instance courts.

##### **b. Standing**

The RCPAs and NAPC are the main entities authorized to bring injunctive reliefs on behalf of consumers. However, this may not be qualified as a representative action, as long as the mentioned entities act in their own right, as provided by law. Consumers are not part of these proceedings, although in principle they are able to join via the voluntary intervention, as mentioned above.

According to GO 21/1992, a RCPA must have a minimum of 3000 members in at least 10 counties and an activity on behalf of the consumers of at least 3 years. The claims introduced by the RCPAs are exempted from the payment of stamp duties. The Public Ministry (the office of the public prosecutor) can also join such actions, in support of the RCPAs. The Public Ministry does not become a distinct part of the litigation, but it will only support the claim, acting in a similar way with the *parens patrie* in the United States of America.

##### **c. Availability of Cross Border collective redress**

Cross border relief is possible, where the *locus standi* is in a different jurisdiction. Enforceable decisions issued outside Romania may be enforced

directly, if issued in another EU Member State, or through the exequatur procedure, if they are issued in a jurisdiction outside EU.

**d. Opt In/ Opt Out**

The only available possibility is for plaintiffs to join claims, through individual and express requests, approved by the court – the voluntary intervention, as explained above. There is no opt-out option provided by law, although certain procedural acts of a party to a case may be undertaken on behalf of the co-participants, if it is considered beneficial to the later. The concerned party may ratify the beneficial procedural acts or may decide to leave the case and bring legal action on its own or together with other aggrieved parties.

**2. Main procedural rules**

**a. Admissibility and certification criteria**

The RCPAs must prove that they meet the criteria to be representative, as set out by GO 21/1992.

**b. Single or Multi-stage process**

The cases are subject to appeal and sometimes to a recourse in front of a higher court: the court of appeal or the High Court of Justice.

**c. Case-management and deadlines**

The judge must have an active role and instruct the parties. The deadline to complete a case in all the degrees of jurisdictions is between 2 to 4 years but the actions brought under Law 193/2000 may take less time.

**d. Expediency (particularly in injunctive cases)**

There are not known examples of injunctions but courts tend to give preference and to accelerate the hearing of cases where it is about abusive clauses, especially in the banking and financial sectors.

**e. Evidence/discovery rules**

The usual procedural rules – *actori incumbit probatio* (the plaintiff must present evidence in support of its claim – apply).

**f. Interim measures**

They are possible under the law but we are not aware of such situations.

**g. Court directed settlement option during procedure**

If the plaintiffs are also companies, the court may ask the parties to find an amicable settlement of their dispute and give a term for reaching a settlement.

**h. In case of out of court settlements**

If settlements are presented to the judge, this is will issue what is referred to as "expedient decision" – a simplified decision, ratifying the settlement and making it binding and enforceable.

### **3. Available Remedies**

#### **a. Type of damages**

NAPC and the RCPAs can only ask injunctions and are not empowered to seek also damages on behalf of consumers.

#### **b. Allocation of damages between claimants for compensatory claims/ distribution methods**

According to the damage of each plaintiff, as proved by each of them.

#### **c. Availability of punitive or extra-compensatory damages and their conditions**

Prohibited

#### **d. Skimming-off/ restitution of profits**

In case of joint actions introduced by undertakings, the compensation would include the non-realised profit (*lucrum cessans*), in addition to the effective damage (*damnum emergens*).

#### **e. Injunctions**

NAPC and the RCPAs can only ask injunctions from the court, on behalf of the consumers.

#### **f. Possibility to seek an injunction and compensation within one single action**

Yes.

#### **g. Limitation periods**

The standard limitation period of 3 years applies.

### **4. Costs**

#### **a. Basic rules governing costs and scope of the rules**

The RCPAs and NAPC are exempted from paying stamp duties for the legal actions introduced based on GO 21/1992 and Law 193/2000.

#### **b. Loser Pays Principle (and exceptions from it)**

There are no exemptions but the court may order a reduction of the lawyer's fees recoverable from the losing party, if these are deemed to be too excessive.

### **5. Lawyers' Fees**

#### **Availability (or not?) of contingency fees and their conditions**

Contingency fees are, as a matter of principle, prohibited by the Lawyers Statutes. However, success fee are used regularly and they may amount to contingency fees, circumventing the prohibition.

## **6. Funding**

### **a. Availability of funding**

Funding may be available from the judicial aid – the ministry of justice.

### **b. Origins of funding (public, private, third party)**

The funding may come from all these sources but third party funding is difficult to provide and it is not common.

### **c. Conditions and frequency of resort to third party funding**

This is not regulated and we are not aware to what extent third-party funding is used.

### **d. Control of funders (Courts/Legislators/Self-regulation)**

The courts may order a reduction of the lawyer's fees recovered by the party winning the case

### **e. Claimant-Funder relationship**

This is normally a private agreement, not disclosed to the court of the public.

## **7. Enforcement of collective actions/settlements**

### **a. Framework for Enforcement**

Enforcement of any court decision is done through the bailiffs, who are private practitioners entrusted with the public authority to enforce the court decisions.

### **b. Cross border enforcement**

Enforcement for decisions issued in another EU member state is relatively easy. Decisions issued in jurisdictions outside EU may be enforced through a exequatur procedure.

## **II. Number and types of cases brought/pending**

There is a significant number of cases brought under Law 193/2000, regarding abusive clauses in credit agreements concluded with banks (43 cases in the period 2014-2016), all of them introduced by NAPC, but there is no specific information as to the number of cases brought under GO 21/992. At least one RCPA brought a similar legal action, also in the financial sector. CPAs started to lodge voluntary interventions in the legal actions brought by NAPC.

## **III. Information on Collective Redress**

### **1. National Registry**

It does not exist yet.

## **2. Channels for dissemination of information on collective claims**

The advent of such situations is usually noticed in the media, as it normally involves large entities, as plaintiffs, such as the banks. NAPC also advertises its activities in this area, through its website and in the media. The court proceedings themselves are available to the public on the website of the Romanian courts: [portal.just.ro](http://portal.just.ro).

## **IV. Case summaries**

No cases available

# SLOVAKIA - FACTSHEET

## Scope

No comprehensive collective redress regime

Code of Civil Procedure (sec. 126 CSP) contains rules for the management of mass judicial claims where at least 10 submissions are addressed to the same court by the same entity during one day.

Abstract control in consumer law (sec. 301 et seq. CSP) with erga omnes effect of judicial decisions relating to unfair contractual terms or unfair competition.

Representative action in consumer and competition law.

## **Problems/Incompatibilities with Recommendation principles**

No functioning regime for collective claims.

## Standing

Consumer associations or groups of consumers

Abstract control: Consumer associations and supervisory authorities

## Admissibility

No specific rules

## Information on Collective Redress

No registry for collective actions

Court may allow to a successful party of the dispute to publish the judgement at the costs of the losing party

## Funding

No specific rules

## Cross Border Cases

National rules on admissibility or standing facilitate foreign claimant or foreign representative entity involvement

## Expedient procedures for injunctive orders

Extended lis pendens and res judicata effect in injunctive proceedings against acts of unfair competition. Affected persons may not be allowed to actively participate in the proceedings, and their individual actions in the same case are not admissible, but nonetheless (controversially) the decision is binding on them.

## **Problems/Incompatibilities with Recommendation principle**

Limitation of right of access to court.

## Efficient enforcement of injunctive orders

Civil Procedure rules apply.

## Opt In/Opt Out

No proper compensatory collective redress mechanism

### **Collective ADR and Settlements**

No specific rules for collective settlements

### **Costs**

Loser Pays Principle

### **Lawyers' Fees**

Lawyers' fees do not incentivise unnecessary litigation

### **Prohibition of punitive damages**

Punitive damages are prohibited.

### **Interplay between injunctions and compensation across all sectors**

In abstract control proceedings, injunctions have a binding effect erga omnes. However, the recovery of consequential damages takes place in separate proceedings independent of former injunctive proceedings. This leads to an inefficient use of judicial resources and potentially divergent decisions.



# **SLOVAKIA - REPORT**

## **I. General Collective Redress Mechanism**

There is no comprehensive legal regulation of collective redress in the Slovak Republic.

In the Code of Civil Procedure (Act No. 160/2015 Coll., Civilný súdny poriadok - CSP) there are traces of collective redress in the provision of § 126 CSP. This provision contains specific rules for mass/collective judicial claims where at least 10 submissions are addressed to the same court by the same entity during one day. However, at a closer look, the legislation does not display any of the features of collective judicial protection. The provision is merely the reaction to some practical problems associated with the administration of mass submissions.

## **II. Sectoral Collective Redress Mechanism(s)**

### **1. Scope/ Type**

Despite the lack of a comprehensive legal regulation of collective redress in the Slovak Republic, some display of a collective protection of rights can be found in specialised legal acts (representative actions) as well as in the Code of Civil Procedure (abstract control claims).

Specialised legal acts grant certain designated entities (representatives) an active right to initiate proceedings instead of the victims (rightholders) who are not parties to the proceedings. The latter follow traditional principles and rules of civil contentious proceedings without any special features or distinctions.

Elements of a representative action can be found in § 3 para 5 of Act No. 250/2007 Coll. on the Protection of Consumer (Consumer Protection Act). According to para 4, consumer associations protect and promote the legitimate interests of consumers and exercise consumer rights. Para 5 grants the right to seek judicial protection of consumers' rights to the individual consumers as well as to the associations. An association has a right to initiate a lawsuit against a perpetrator in order to force him to abstain from illegal conduct and to remove an unlawful situation where such offender's conduct harms individual or collective interests of consumers.

Another element of collective judicial protection, once again in form of a representative action, can be found in Act No. 513/1991 Coll. Commercial Code and concerns the protection against unfair competition (sections 54, 55). Persons whose rights have been infringed or threatened by an act of unfair competition may initiate a lawsuit against the offender in order to force him to abstain from this behaviour and correct the situation. They may also claim reasonable satisfaction, which may be provided in money, compensation for damages and unjust enrichment. Limited standing to bring an action against the perpetrator is also granted to legal persons authorized

to defend the interests of competitors and consumers. The legitimization of these representative bodies is restricted to injunctions against the illegal conduct.

Elements of collective protection of rights can also be found in the provisions on the so-called abstract control. This legislation was introduced to implement Directive 2009/22/EC of 23 April 2009 on injunctions for the protection of consumers' interests. The CSP establishes special provisions for disputes protecting weaker parties, including consumer disputes. Particular rules are then devoted to the abstract control procedure in consumer affairs (section 301 et seq. CSP). In these proceedings, the court examines the unacceptability of contractual terms in a consumer contract or other contractual documents related to it and unfair commercial practices, and that irrespective of the circumstances of the particular case. The purpose of the abstract control procedure is to protect consumers from the continued future use of unacceptable contractual terms or unfair practices. The decision given in these proceedings has an erga omnes effect (§ 306 CSP). In addition, the CSP maintains the possibility of individual legal proceedings of consumers, which have certain specific features in comparison with classical lawsuits as they aim at protecting the weaker party (section 290 et seq. of CSP).

## **2. Procedural Framework**

### **a. Proceedings initiated by a representative entity**

Proceedings initiated by an authorized legal entity have no specific features compared to classical contentious judicial proceedings. Such actions fall under the authority of the civil courts. Jurisdiction is determined according to general criteria set out in the CSP. The court has no special status in these proceedings. Only the representative entity and the defendant are parties. The decision normally binds only the parties.

However, it is important to draw attention to the fact that Sec 54 para 2 Commercial Code (in injunctive proceedings against acts of unfair competition) provides for the so-called extended *lis pendens* and extended *res judicata*. As soon as the proceedings have been initiated, actions of others based on the same claims in the same case are not admissible. In this category of disputes, if the action is brought by a representative body (or a court already made a final decision on the merits in the representative action), the rightholders can no longer initiate proceedings or be a party to the present proceedings, but nonetheless (controversially) the decision is binding on them (unlike in classical proceedings where the decision has *inter partes* effect).<sup>648</sup> This broad understanding of *lis pendens* and *res judicata* limits the right of access to the courts.

The current legislation does not reflect the right to a fair trial as affected persons may effectively not be allowed to actively participate in the proceedings as parties. Although they may intervene, they have no equal status with the parties, eg with respect to the possibility of filing a motion for prospective enforcement of the judgment. In addition, they can only join on the condition that they have been informed about the proceedings on time.

In fact, the law does not oblige the court to publish information about the initiation of proceedings. Rules on publication only exist for satisfactory

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<sup>648</sup> Similarly, if a person concerned (the holder of the right) initiated the proceedings, representative body lost the right to fill the action or become a party to the proceedings.

judgments. The court may allow a successful party to publish the judgement at the costs of the losing party. Depending on the circumstances, the court may determine the scope, form and manner of publication.

It is possible to settle during the proceedings (section 148 CSP). The court shall decide whether to approve the settlement or not. It does not approve the settlement if it violates the law. The approved settlement has the same effects as a final judgment.

The financing of this type of proceedings is not specifically regulated.

The 'loser pays' principle (section 255 CSP) applies to the costs of proceedings.

Only a party to proceedings may initiate the enforcement of the final judgment.

#### **b. Abstract control proceedings**

The Regional Courts in Bratislava, Banská Bystrica and Košice are responsible for proceedings concerning an abstract control in consumer matters. An appeal goes to the Supreme Court.

Such action may be brought against a contractor. Standing is only granted to legal persons established or created for the purpose of consumer protection and to supervisory authorities subject to specific legal regulation (section 302 CSP). Supervisory authorities are the National Bank of Slovakia or the Slovak Trade Inspection. Consumers are not entitled to bring this action, but they are not deprived of their individual defence rights. Individual proceedings in these cases show some specific features in comparison to classical lawsuits in order to protect the weaker party (§ 290 et seq.).

With regard to the purpose of the abstract control procedure, an investigative principle is used in the course of taking of evidence. According to § 303 para 2 CSP, the court is entitled to gather evidence that has not been proposed by the parties if this is necessary to decide the case. The court shall provide such evidence of its own motion. No concentration of proceedings shall be applied here (§ 303 para CSP). There is no need to order a hearing in this type of proceedings. Besides that, all other provisions on classical contentious proceedings apply.

The court's decision on the merits shall take the form of a judgment. If it accepts the claim, the court decides that a contractual term is unlawful, expressly stating its wording, or it specifies that a commercial practice is unfair. Consequently, the defendant may not use this or an equivalent term in any other consumer contract or related documents or may no longer use an unfair commercial practice (§ 305 CSP). In the event of a successful claim, the applicant is entitled to ensure the publication of the final judgment. However, in view of the binding nature of such erga omnes decision, it would be preferable to secure publication by the court, for example in a generally accessible registry. The judgment is binding not only for other consumers but also for all suppliers using the same practices, although they are not parties to the proceedings. They may only intervene in the proceedings but with less rights, provided that they know proceedings are ongoing: the law does not oblige the court to publish information about the initiation of proceedings.

Potential subsequent enforcement proceedings (execution) can only be claimed by the parties to the initial proceedings.

### **3. Impact of the Recommendation/Problems and Critiques**

#### **Problems relating to access of justice/fairness of proceedings**

The current legislation on collective redress in Slovakia is totally inadequate. The elements of collective legal protection that can be found in the legal system do not provide sufficient protection, neither at a substantive nor at a procedural level.

In injunctive proceedings in the area of unfair competition, not all concerned subjects have a right to stand as parties to the proceedings, but the decision is nevertheless binding on them. Those concerned persons may only participate in the proceedings as interveners. Often, however, they cannot access any information about the initiation of proceedings.

Also, the rules for the so-called abstract control in consumer affairs are insufficient. It is problematic that only a legal entity established or created to protect consumers or a supervisory authority and a supplier may be party to the proceedings. However, the judgment is binding erga omnes, not only in relation to other consumers but also to all suppliers using the same practices. However, they are not parties to the proceedings. They may participate only as interveners provided that they got information about the initiation of proceedings, which is often not the case.

### **III. Information on Collective Redress**

#### **1. National Registry**

There is no national registry in the Slovak Republic.

#### **2. Channels for dissemination of information on collective claims**

The law does not oblige the court to publish information about the initiation of proceedings.

According to § 55 para 2 Commercial Code the court may allow to a successful party of the dispute to publish the judgement at the costs of the losing party. Depending on the circumstances, the court may determine the scope, form and manner of publication. In this case, those who wish to take action for compensation are informed about the outcome of the proceedings.

### **IV. Case summaries**

There are no key cases.

# SLOVENIA – FACTSHEET

## **Scope**

There is currently no general act on collective redress although a proposal for an act based on the Commission Recommendation is being considered by the legislature ('CRA').

Currently collective redress is available in consumer claims under the Consumer Protection Act (CPA). This provides for injunctive relief only

The Environment Protection Act provides for a collective action in environmental cases

## **Problems/Incompatibilities with Recommendation principles**

Currently (notwithstanding the CRA) there is no general procedure.

## **Standing** (Para. 4-7)

Existing consumer protection organisations have standing to bring collective actions

Under the CRA not for profit private law entities are able to start a collective action where there is a close connection between the aims of the organisation and the rights violated. The CRA also allows for ad hoc organisations founded with the aim of organising the collective redress.

Under the CRA discrimination actions can be brought by the Equal Rights Ombudsman or a recognised NGO operating in the field.

## **Admissibility** (Para. 8-9)

Under the CRA, admissibility is decided at the first stage in the proceedings. In determining the admissibility of the action the court will consider:

The size of the class

Whether aggregate damages can be determined

Whether collective proceedings are an efficient way of dealing with the common issues.

Whether an alternate method of dispute resolution is available/suitable.

## **Information on Collective Redress** (Para. 10-12, 35-37)

Under the CRA the main route for the dissemination of information about collective redress is the national registry.

The court may make the certification of a claim conditional on the claimant undertaking certain actions regarding the dissemination of information regarding the action.

## **Funding** (Para. 14-16)

Third party funding is permitted.

The claimant must publicly inform the court of its source of funds. The court will not certify a collective action where there is a conflict of interest between the funder and the claimant.

Third parties are prevented from funding actions against competitors. They are also prevented from influencing the procedural choices of the claimant.

## **Cross Border Cases** (Para. 17-18)

Foreign claimants can participate in collective proceedings.

Under the CPA injunctive claims can be filed by independent public authorities established in other member states provided that the actions complained of affect consumers in that member state.

#### **Expedient procedures for injunctive orders** (Para. 19)

Time limits and procedures are the same for all collective actions

Under the CRA the claimant can request a temporary injunctive measure prior to the commencement of the main action and even before the harmful acts have commenced.

#### **Efficient enforcement of injunctive orders** (Para. 20)

Under the Claim Enforcement and Security Act the enforcement of injunctive orders is supported by a series of fines.

#### **Opt In/Opt Out** (Para. 21-24)

The position of opt in or opt out is not covered by the current legislation. Declaratory judgments relating to certain contractual provisions will be binding in further consumer cases concerning those provisions

The CRA provides for both opt in and opt out procedures. Which one will be used is at the discretion of the judge who must consider all the circumstances of the case.

The opt-out procedure is justified by the sound administration of justice where the individual claims are of low value

In cross border cases the opt-in procedure is mandatory.

#### **Problems/Incompatibilities with Recommendation principles**

Both opt-out and opt-in procedures are possible.

#### **Collective ADR and Settlements** (Para. 25-28)

Under the CRA Proposal the parties are encouraged to settle disputes by alternative means. At the outset the parties can be referred to mediation. The court can assist in the settlement

The court will review and approve any settlement reached by the parties

The parties can also reach out of court settlements. These are considered contracts and fresh proceedings must be brought to enforce them.

#### **Costs** (Para. 13)

The general rule is that the loser pays. The court fees as well as costs depend on the overall value of the claim. Under the CRA the value is set at 20% of the full amount of the individual claims of the group or 20% of the aggregate amount of damages.

The costs include those which were necessary both in filing the action and informing group members

Individual group members are neither liable for costs nor entitled to have their costs reimbursed. The costs liability falls on the representative.

#### **Lawyers' Fees** (Para. 29-30)

The CRA allows for contingency fees:

Lawyers can obtain up to 15% of the final judgment or, if the lawyer accepts the entire costs risks of the proceedings 30%. The court has to be satisfied that the agreement is reasonable at the certification stage.

Lawyers' fee agreements do not incentivise unnecessary litigation

**Prohibition of punitive damages (Para. 31)**

Extra-compensatory damages are not available.

**Collective Follow- on actions (Para 33-34)**

Under the CRA follow on actions are available in competition cases. The limitation period is suspended from the commencement of the administrative proceedings until the end of one year following the administrative decision.

Where a collective action has commenced and the administrative authority subsequently takes action the collective claim shall be stayed until the end of the administrative proceedings.

**Interplay between injunctions and compensation across all sectors**

Under the CPA, there is no basis for bringing a collective compensation claim based on an injunction.

Under the CRA decisions regarding injunctive proceedings will be binding on other courts as to the liability of the defendant.

There is no explicit option to bring both an injunctive and compensatory claim together. This will be at the discretion of the court.

# SLOVENIA – REPORT

## I. General Collective Redress Mechanism

### 1. Scope/ Type

Currently, collective redress is only provided for in consumer disputes. Only actions for the cessation of illegal practices and actions for a declaration of nullity are provided for in the CPA. No collective compensatory action is available (for the mechanism of actions for nullity, see above).

The Slovenian Civil Procedure Act<sup>649</sup> provides for similar mechanisms: joinder of claims (Sl. *atrakcija pristojnosti*, e.g. Art. 49), joinder of proceedings (Sl. *združitev pravnih*, Art. 30), as well as, as of 2008, a so-called “model procedure” (Sl. *vzorčni postopek*, Art. 279b). However, these mechanisms do not provide for a possibility that an action be filed on behalf of third persons. They merely help to deal with related actions which have already been commenced in a more economical way. Importantly, the risk related to the costs of losing the proceedings stays entirely with the injured parties.<sup>650</sup>

However, the CRA which is about to be adopted (see above) will grant the possibility of compensatory, as well as injunctive collective redress. The act will apply in specifically defined civil, commercial and labour law matters. Special chapters of the CRA Proposal deal with collective redress in consumer disputes and in the field of discrimination (in the latter field, only injunctive redress will be available).

### 2. Procedural Framework

The CRA Proposal contains several procedural provisions. For the questions not regulated in the CRA, Art. 11 of the CRA proposal provides for a subsidiary application of the Slovenian Civil Procedure Act.

#### a. Competent Court

The CPA does not set out any procedural provisions on the jurisdiction of the courts for collective actions in consumer disputes, the general provisions of the Slovenian Civil Procedure Act therefore apply. The competent court regarding the injunctive and declaratory actions will thus be the court in the place of the permanent residence or statutory seat of the defendant.

Under Art. 6 of the CRA Proposal, the District Court of Ljubljana (*Okrožno sodišče v Ljubljani*) has exclusive jurisdiction for deciding on collective claims and requests for collective settlements. In labour law disputes where labour courts would have jurisdiction for individual claims, the Labour and Social Court in Ljubljana (*Delovno in socialno sodišče v Ljubljani*) has jurisdiction for collective claims and settlements.

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<sup>649</sup> Zakon o pravdnem postopku (ZPP), Official Gazette RS, No. 26/99 of 15 April 1999, with further amendments.

<sup>650</sup> Cf. CRA proposal, p. 7.



Art. 6/3 of the CRA Proposal specifically states that the above-mentioned rules do not affect rules on jurisdiction and applicable law in cross-border disputes.

## **b. Standing**

The currently applicable legislation in consumer disputes, as well as the CRA Proposal opted for the organisational type of collective redress.

Under the Consumer Protection Act, previously established consumer organisations have standing to file collective actions on behalf of the injured parties. Injunctive and declaratory actions can also be filed by an organisation of which the defendant is a member. Actions can be filed by qualified entities from other Member States, after consultation with the Slovenian Office for Consumer Protection (*Urad za varstvo potrošnikov*).<sup>651</sup>

The CRA Proposal grants standing for filing collective actions and for requesting a collective settlement to all “private law legal entities who exercise a non-profitable activity and where there is a direct connection between their main goals of action and the rights which were allegedly violated and regarding which the action is being filed”, as well as to the State Attorney (Art. 4/1 of CRA Proposal). The latter, however, does not have standing in proceedings where the defendant is the Republic of Slovenia (Art. 4/3 of CRA Proposal).

Regarding injunctive actions in consumer matters, the CRA Proposal grants standing only to legal entities which were founded with the aim of protecting consumer rights and interests (Art. 52/1). They can, however, also be founded *ad hoc*, with the aim of obtaining collective redress for a specific violation of rights.<sup>652</sup> The Ministry of Commerce will inform the European Commission of the entities qualified for filing injunctive actions. Furthermore, such action can be filed by a chamber or a business association of which the defendant is a member (Art. 52/2).

The filing of a collective injunctive action does not prevent individual consumers from filing actions on their own behalf for the protection of their rights arising from the legal relationship with businesses (Art. 53 of the CRA Proposal). The judgment given on the basis of a collective action is binding on the courts deciding on individual claims of the consumers (Art. 55).

Art. 57 of the CRA Proposal regulates standing for filing injunctive collective actions in the area of discrimination. Such actions can only be filed by the Slovenian Equal Rights Ombudsman (*Zagovornik načela enakosti*)<sup>653</sup> or an NGO with a recognised status of acting in the public interest in protection against discrimination or protection of human rights under the legislation regarding the protection against discrimination.

The persons or entities, which have standing under Art. 4 of the CRA Proposal must furthermore be deemed able to represent the group on behalf of which they wish to file the collective action. Under Art. 6 of the CRA Proposal, the court determines whether the claimant fulfils this condition, taking into account all circumstances of the case, e. g. the existing financial means,

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<sup>651</sup> Such office no longer exists as a separate authority; the Ministry of Economy and Technology took over its tasks.

<sup>652</sup> CRA Proposal, p. 15.

<sup>653</sup> The authority competent for the protection against discrimination under the Protection against Discrimination Act (*Zakon o varstvu pred diskriminacijo*, Official Gazette RS, No. 33/2016 of 9 May 2016).

human resources and legal knowledge for representing the group, the activities already accomplished regarding the preparation of the collective settlement or collective action, as well as the organising of the injured persons and the communications with them. The potential claimant must convince the court that they will adequately and fairly represent and protect the interests of the whole group. When there are several potential claimants that cooperate regarding the filing of the collective action or settlement, in that they represent a part of the group each, they must all satisfy the conditions mentioned above.

### **c. Availability of Cross Border collective redress**

Under Art. 75/3 of the currently applicable CPA, collective injunctive claims can be filed by an organisation or an independent public authority (e. g. consumer ombudsman) who is, under the law of another EU Member State, established for the protection of the rights and interests of the consumers in that state, if the activity to which the claim relates can affect the situation and the rights of the consumers in that EU Member State.

Art. 56 of the CRA Proposal regulates active standing of entities from other Member States of the EU for filing the injunctive collective action in the area of consumer protection. This is possible if the contentious actions of the business having its statutory seat in Slovenia, or actions which originate in Slovenia, can affect the situation and the rights of consumers in another EU Member state. In such a case, the injunctive collective action can also be filed by an organisation or an independent public authority, which was founded for the protection of the rights and interests of consumers in that country. Such entities and authorities must figure on the list of persons qualified for filing injunctive collective actions, published in the Official Journal of the EU.

### **d. Opt In/ Opt Out**

#### **Principal availability of either/or/both options?**

As the legislation currently in force only provides for injunctive and declaratory redress, where the position of third parties (ie. members of the group) can only be improved, the issue of opting in or out is not addressed. Namely, the binding effect of the declaratory judgments obtained under Article 76 of CPA is construed in the way that in the case when the defendant is condemned and certain contractual provisions are declared null and void, courts are bound by that decision when deciding on individual claims of the consumers regarding such contractual provisions. On the other hand, if the defendant wins the collective proceedings, the consumers can still assert the nullity in individual compensatory or other proceedings.

The CRA Proposal which, in addition regulates compensatory mechanisms of collective redress, provides for both options.

#### **Conditions for either type (prescribed by law or discretion of the judge?) Opt-out restricted to in-jurisdiction claimants?**

The CRA Proposal leaves the decision for opt-in or opt-out system to the discretion of the judge, with some exceptions. Under Art. 30 of the CRA Proposal, the judge must consider all the circumstances of the case, above all the value of individual claims of the members of the group and the circumstances, which are crucial for the certification of the collective compensatory action. If at least one of the claims included in the collective

action is seeking compensation for non-pecuniary damage, or if at least ten percent of the members of the group are claiming payment in an amount over 2.000 EUR, only opt-in can be applied.

Furthermore, persons who at the moment of the issuance of the decision on the certification of the collective claim for damages do not have permanent residence or statutory seat in Slovenia must opt-in to the claim.

### **Opt-out justified by the sound administration of justice**

The possibility of adopting the opt-out option in the CRA Proposal is justified by its effectiveness. The experience in other countries has shown that, especially in cases of relatively small damage sustained by individuals, the members of the affected group often do not take the time and effort to communicate their decision to the court and thus do not participate in collective redress conducted under the opt-in system. The opt-out system results in a larger number of participating individuals, which, as is stated in the CRA proposal, can also be beneficial for the defendants. Namely, the risk of individual claimants initiating separate proceedings will be smaller and therefore it will be easier for the defendant to evaluate the whole amount of the compensation they will have to provide as a result of a certain business practice.<sup>654</sup> The fact that more potential individual claimants are participating in the collective redress also enables a better response by the judiciary which will not have to deal with large numbers of individual proceedings.

### **Specific measures related to the fact that affected persons are not identifiable**

Under Art. 31/3 of CRA Proposal, the court decides on other measures for informing the members of the affected group, if not all members are known and cannot be notified by regular post or e-mail (Art. 31/2). Other measures of informing depend on the number and the composition of the group and where they are located. This can be publication in printed media, in electronic media, the existing internet sites or sites which must be established by the plaintiff.

## **e. Main procedural rules**

### **Admissibility**

The CRA Proposal regulates the admissibility criteria of a collective compensatory claim in Art. 26. Beside the general admissibility criteria for civil claims from the Civil Procedure Act, the collective compensatory claim must contain the following information:

- the specification that the claim is being filed as a collective compensatory claim;
- information about the parties, their addresses and legal representatives;
- a statement of facts and the proposed evidence by which the claimant shows the fulfilment of the conditions from Art. 28 of the CRA Proposal, namely:
  - . all the circumstances which are common or similar for all the members of the class,

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<sup>654</sup> CRA Proposal, pp. 10, 11.

- . the circumstances for which the claimant knows that they are important only for certain members of the class and other circumstances,
- . the basis on which it can be assessed whether the collective claim is an adequate legal remedy;
- a description of the mass damage, the facts, the evidence and the legal arguments aiming to show that the claim is founded;
- a description of the class; if there are sub-classes regarding the nature and the amount of damage, such sub-classes must also be described in detail;
- an estimation of the number of the members of the class, as well as the estimation regarding each sub-class if they exist, and the foundation for such estimation;
- a declaration as to whether the proposed proceedings should follow the opt-out or opt-in principle, and the reasons for the chosen option;
- an estimation of the full amount of the monetary compensation or other satisfaction, as well as such estimation regarding sub-classes if they exist, by way of categorisation of damages;
- an explanation of the method of the calculation of the amount from point 8;
- a proposal as to the determination of damages as aggregate damages or as individual amounts for each member of the class, and the reasons for the proposed option;
- a proposal regarding the method of informing the members of the class, e.g. by notification in person, by publication in the media and the establishing of adequate internet sites;
- proposals regarding the conditions for the determination of the right to obtain damages;
- information regarding the costs of the proceedings and the financing of the proceedings by third persons under Art. 59:
- where applicable, information as to whether the authority competent for the protection of competition has already issued a decision regarding the violation and if such decision is final.

The plaintiff must also enclose a copy of the decision on the violation, if it exists, and any other document to which the claim refers, as well as, if possible, the list of all known members of the class with the latest known addresses of their permanent residence or statutory seat.

### **Certification**

Art. 28 of the CRA Proposal regulates certification (confirmation) of the collective compensatory claim. After receiving the defendant's answer to the claim concerning the conditions for certification of the collective compensatory claim, or after the expiration of the period for such answer, the court determines an audience regarding the certification. Both parties are invited to participate at the audience. Members of the group or other qualified organisations can inform the court of their position concerning the questions relating to the certification of the claim. If the court deems necessary it will invite such person or entity to participate at the audience and present their view.

The court will certify (confirm, allow) the collective compensatory claim under the conditions of Art. 28/4 of the CRA Proposal where:

1. the different demands which constitute the collective claim are of the same nature, they are filed on behalf of a determinable group of persons and they

concern the same, similar or connected factual or legal issues, they concern the same case of mass damage and they are suitable for being decided on in collective proceedings.

2. there are more common legal and factual issues for the whole group than questions relating only to individual members of the group;
3. the group is so numerous that the filing of individual claims or another manner of joining its members, e.g. joinder of claims or joinder of actions, would be less efficient than the filing of a collective compensatory action;
4. the plaintiff fulfils the conditions regarding the ability to represent the group under Art. 5 of the CRA Proposal;
5. the collective compensatory action is not manifestly ill founded;
6. the conditions of Art. 59 of the CRA Proposal regarding the agreements on costs and funding are fulfilled;
7. the court deems that the eventual agreement with the lawyer on contingency fees under Art. 61 of the CRA Proposal is reasonable.

When deciding on the adequacy of the claims for being dealt with within a collective compensatory claim the court will take into account the following factors:

- whether the collective proceedings enable an effective resolution of common legal and factual issues;
- the costs and benefits regarding the continuation of the collective proceedings;
- whether the members of the class have filed any individual claims regarding these or similar claims;
- the size and characteristics of the class;
- how the membership of the class may be established;
- whether aggregate damages can be determined regarding the claims;
- whether alternative dispute resolution or other options for resolving the dispute are available.

Art. 29 of the CRA Proposal regulates the court's decision on the certification of the collective compensatory action. If the court deems that the conditions set out above are not fulfilled, it will dismiss the collective action. This is a procedural decision with no *res judicata* effect. If the conditions are fulfilled, the court issues a decision which must contain information about the plaintiff and the defendant, the description of the mass harmful event to which the collective proceedings refer, a detailed description of the group, the decision on opt-in or opt-out type of the action and the time limit between 30 and 90 days for the members to inform the court of their decision to opt-in or out, the time limit for written statements of the group members and other qualified persons, and the decision on the manner of informing the group members.

The court can make its decision on certification conditional on the plaintiff undertaking additional steps, for example, making information about the collective action available to the public (e.g. that they establish an internet page), or that the plaintiff deposits security for the costs of the proceedings which would have to be reimbursed to the defendant in case the latter wins.

In the decision on certification of the collective compensatory action, the court sets a time limit between 30 and 60 days from the finality of the latter decision for the defendant to respond to the claim.

## **Single or Multi-stage process**

Under the CRA Proposal there is a four-stage process. After the certification of the claim (first stage of the proceedings), there is the period in which members of the class either opt-in or opt-out of the proceedings (depending on the decision of the court on this question) (second stage). When the designated period expires, the court will proceed with the deciding the claim on the merits (third stage). The final decision is followed by the enforcement (fourth stage).

## **Deadlines**

Under Art. 27/2 the court serves the admissible claim on the defendant for response. At this stage only the arguments regarding the certification of the claim are to be asserted. No time limit is provided for in the CRA Proposal, so the 30-day time limit from the Civil Procedure Act applies (Art. 277/1).

At the time of service on the defendant, the collective action is published in the Registry of Collective Actions (without the names of the known members of the group).

After receiving the defendant's response regarding the certification conditions (or after the expiration of the time limit for the defendant's response), the court invites both parties to a hearing where the certification criteria is discussed.

In its decision to certify the action, the court sets a 30-90 day time limit for the members of the class to opt in or out. In this decision, the court also sets a 30-60 day time limit for the defendant to respond to the claim on the merits, as well as a time limit for the potential members of the group and other qualified entities to lodge their written arguments.

The CRA Proposal does not set any other deadlines. The Civil Procedure Act has effect regarding all other deadlines.

## **Case management**

In comparison with regular civil proceedings, the court has a much wider jurisdiction to actively manage collective proceedings with the aim of protecting the interests of the individual members of the group who are not parties to the proceedings. The court exercises this role throughout the different stages of the collective proceedings, starting with the assessment of the plaintiff's ability to represent the group, and further with certification the claim, during the proceedings on the merits and in the proceedings for the enforcement of the judgment. This enhanced role of the court is further justified by the usually high complexity of collective proceedings.<sup>655</sup>

Under Art. 35 of the CRA Proposal, the recognition of facts, the withdrawal of the claim, the modification of the claim or the renouncement of the claim will be accepted by the court only if the court deems that this is not contrary to the interests of the group. If the court deems that the plaintiff severely violates the interests of the group or that the plaintiff can no longer be considered as an adequate representative of the group, the court can, based on the proposal of a member of the group or another qualified organisation, issue a decision that the plaintiff be replaced with another qualified organisation or with one of the members of the group if they are ready to enter the proceedings. The original plaintiff nevertheless remains liable for all

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<sup>655</sup> CRA Proposal, p. 12.

the costs incurred until the replacement of the plaintiff. If such replacement is not possible, the court issues a decision ending the collective procedure.

### **Expediency (particularly in injunctive cases)**

In injunctive cases, the plaintiff must first inform the potential defendant of their intent to file a collective injunctive action. The action can only be filed after a minimum of 15 days from the potential defendant's receiving such information (temporary injunctions can still be demanded under the Claim Enforcement and Security Act without regard to the latter time limit).

Other time limits and deadlines are the same as in collective compensatory cases explained above.

### **Evidence/discovery rules**

The CPA and the CRA Proposal do not contain any rules on evidence. Hence, the rules of the Civil Procedure Act apply. Currently, the latter does not contain rules providing for discovery/disclosure. In principle, the parties cannot be obliged by the court to provide evidence which could harm them. However, amendments to this act have already been adopted by the Slovenian Parliament and will enter into force in September 2017. Under the new rules, disclosure/discovery will be possible to a certain extent. Namely, parties will be able to ask the court to oblige the opposite party to disclose specific information and the court will decide whether the right of the demanding party to a fair trial prevails over the right of the other party to withhold potentially harmful evidence. If the request is granted, the court will decide whether the documents must be disclosed as a whole or whether the opposite party can redact them in order to conceal certain information which is unnecessary for the proceedings. Also, an expert can be appointed to study the documents and prepare a report for the court, without the court or the parties seeing the full set of documents (new Art. 219b of the Civil Procedure Act). This amendment will presumably be of much use, especially in antitrust collective proceedings.

### **Interim measures**

Under Art. 50 of the CRA Proposal, the plaintiff can request the issuing of a temporary protective measure following the provisions of the Claim Enforcement and Security Act (cited above) by which the court orders the defendant to cease the activity damaging the common interests of the consumers. The court can issue a temporary protective measure even where the defendant has not yet started the harmful actions provided they are about to start. The Claim Enforcement and Security Act regulates the conditions for the issuing of such a measure. Under Art. 272, the plaintiff must demonstrate the probable existence of the claim, as well as the danger that the claim will not be satisfied without the issuing of the temporary measure (or that the defendant will not suffer worse consequences if the measure will prove not to be founded than the plaintiff would suffer if such measure was not granted).

### **Court directed settlement option during procedure**

Chapter II (Arts. 12 to 25) of the CRA Proposal regulates the procedure for confirmation of a collective court settlement. The parties can conclude a settlement confirmed by the court without filing a collective compensatory action. Where an action has been filed the court will, following the principle of

peaceful dispute resolution, promote the possibility of settlement and assist the parties in reaching one.

The court not only controls the formal aspect of the collective settlement, but also assesses whether the settlement guarantees a reasonable and just compensation for the different categories of injured parties, accounting for the fact that compensation obtained by a settlement will naturally be somewhat lower than that claimed in the proceedings.<sup>656</sup>

At the beginning of the proceedings, the court can also refer the parties to mediation under the Act on Alternative Dispute Resolution in Judicial Matters.<sup>657</sup>

### **In case of out of court settlements: judicial control**

A settlement controlled and confirmed by the court is referred to as a 'court settlement' (although the contents were entirely drafted outside of the court). Out-of-court settlements are considered as contracts and in the case of refusal by the debtor to fulfil their obligation from such settlement, the creditor must initiate judicial proceedings to obtain an enforceable judgment.

## **3. Available Remedies**

### **a. Type of damages**

Art. 39 of the CRA Proposal provides that in a case where all the members of the group are known and it is possible to decide on their individual claims without this prolonging the proceedings disproportionately, the court will name all members of the group in the operative part of the judgment together with the amount of money or other obligation that the defendant must provide to each of them. Such a collective compensatory judgment is an enforceable title and each member of the group can initiate enforcement proceedings regarding the amount that is owed to them.

Art. 40 of the CRA Proposal regulates situations where it is not possible to determine the damages individually. In such cases the court will determine, in the operative part of the judgment, the total amount of the damages or other compensation (aggregate damages) or an amount or otherwise determinable value (e.g. percentage of the price or a unit) or other obligation which will be fulfilled to every member of the group who has applied or will apply and prove that they fulfil the conditions determined in the judgment, whereas the court also estimates the expected full amount of the fulfilments of the defendant. The court will set a time limit, no shorter than 90 days and no longer than six months, within which the members of the class must demand fulfilment. The amount of aggregate damages or the expected full amount of payments must be transferred on the fiduciary account of a notary who was nominated as the administrator of the collective damages.

### **b. Allocation of damages between claimants for compensatory claims/ distribution methods**

If the court determined the individual amounts of damages payable to the known members of the group, then they will be served with the collective

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<sup>656</sup> CRA Proposal, p. 11.

<sup>657</sup> Zakon o alternativnem reševanju sodnih sporov, Official Gazette RS, No. 97/09 of 19 November 2009, and 40/12 of 30 May 2012.



judgment and will be able to start enforcement proceedings regarding their individual claims.

If the court determined aggregate damages or the amount of damages for not individually named members of the group, the latter are informed of the collective judgment under the same rules as they were informed about the opting in or out of collective proceedings (via regular post, e-mail or/and media).

The administrator of the collective damages makes a draft list of the injured parties and sends it to the court, to both parties and to the persons for which the administrator deems that they cannot figure on the list. Both parties can oppose specific persons being on the list. The court examines the list of injured parties at a hearing, to which the administrator, both parties and the persons who were not put on the list by the administrator or whose listing was opposed to by the parties, are invited. After the hearing, the court decides on the final list of injured parties and amounts of money or other fulfilments to which they are entitled. No appeal is possible against such decision.

What follows is the payment of damages to the injured parties. If, after all the payments and the payment of the costs of the proceedings, there is any money left, it will be returned to the defendant. After the accomplishment of all acts regarding the payments, the administrator prepares the final report including the list of all payments, and sends it to the court for confirmation. The collective compensatory procedure is finished when the court issues its decision confirming the final report.

**c. Availability of punitive or extra-compensatory damages and their conditions**

Punitive damages are not allowed.

**d. Skimming-off/ restitution of profits**

The CRA Proposal does not provide for skimming-off or the restitution of profits arising from illegal conduct (outside compensation that will have to be paid in the case of a successful compensatory collective claim).

**e. Injunctions**

Chapter IV (Arts. 47 to 50) of the CRA Proposal regulates the collective injunctive actions within the material scope of application of the Act. Based on such actions, the court can order the ceasing of the violations or the endangering of the common interests of a large number of persons or of persons who cannot be individually named, as well as the interdiction of such actions in the future. In cases where a special state authority is established for the protection of specific groups or interests, such authority can also file the collective injunctive claim, beside the other qualified persons from Art. 4 of the CRA Proposal.

Before filing the injunctive claim, the qualified organisation must inform the future defendant of their intent to file the collective injunctive claim if they do not cease the prohibited activity. The collective action can be filed no earlier than 15 days following the receiving of the said warning by the potential defendant. Nevertheless, the potential plaintiff can request that the court issue a temporary protective measure before the filing of the claim.

If the court finds that the collective injunctive action is well founded on the merits, it will establish the existence of the activity, which violates the collective rights, order that the defendant must cease such activity, and forbid such activity in the future. The court can also decide that the judgment be published at the cost of the defendant or that an illegal advertising be rectified, if it deems that this would contribute to the mitigation or elimination of the damaging consequences of the violations.

**f. Possibility to seek an injunction and compensation within one single action**

The possibility to seek an injunction and compensation within one single action is not expressly provided for in the CRA Proposal. We deem that it is in the discretion of the court to decide whether all criteria for the admissibility and the certification are met and if both actions can be dealt with together.

**g. Possibility to rely on an injunction in separate follow-on individual or collective damages actions**

The judgment in collective injunctive proceedings does not constitute a basis for individual or collective compensation claims. Equally, if the injunction is not granted, this does not preclude the possible future individual claims for damages.<sup>658</sup>

However, in consumer disputes, Art. 54 of the CRA Proposal provides that the judgment granting the interdiction of certain general contractual conditions or contractual provisions prepared in advance, includes the interdiction for the business to invoke such conditions or provisions in previously concluded contracts. If the court establishes the illegal doings of the business, such judgment is binding on other courts regarding the proceedings initiated by individual consumers for the protection of their rights from the legal relationships with the same business (Art. 55).

**h. Limitation periods**

Art. 8 of the CRA Proposal regulates special rules on the limitation periods regarding claims which are dealt with in collective proceedings. The limitation periods regarding claims which are the object of a collective compensatory claim or of a proposal for a collective settlement are suspended for the duration of the collective proceedings. They continue to run from moment when the proceedings are ended without a decision on the merits, or, regarding persons who are not bound by the collective judgment or collective settlement, when the time limit for opting in or not opting out expires. In the case of legal time limits for starting judicial proceedings regarding a claim which is the object of collective proceedings, such time limits cannot expire less than 30 days after the ending of the collective proceedings.

**4. Costs**

**a. Basic rules governing costs and scope of the rules**

Funding is regulated in Chapter V of the CRA Proposal. The court fees, as well as attorney fees, depend on the value of the object of the claim, which in collective redress will often be very high. Since this could dissuade the potential plaintiffs, Art. 58 of the CRA Proposal provides that the value of the

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<sup>658</sup> CRA Proposal, p. 18.

object of the claim (regarding which the fees will be calculated) is considered as the amount of 20% of the full amount of the individual claims of the group members or 20% of the demanded aggregate damages. In injunctive collective actions, such estimated value cannot be higher than 10.000 EUR.

Art. 25 of the CRA Proposal provides that the parties to the collective court settlement must cover half of the costs each, if the settlement does not provide otherwise.

#### **b. Loser Pays Principle (and exceptions from it)**

Under Art. 60 of the CRA Proposal, the party who does not succeed in the collective proceedings must pay the opposite party the costs which were necessary for conducting the proceedings. The necessary costs include the costs which were necessary in order to prepare for the filing of the collective action and to inform the group members.

Under Art. 62 of the CRA Proposal the individual group members are not entitled to reimbursement of the costs and they are not liable for the payment of the costs of the defendant, except from those which they caused themselves.

### **5. Lawyers' Fees**

Lawyers' fees are regulated in Art. 17 of the Slovenian Attorneys Act.<sup>659</sup> The attorney has the right to obtain payment for their work and compensation of the costs related with their work based on the Attorneys Tariff<sup>660</sup> adopted by the Attorneys Chamber after the previous consent of the Minister of Justice and published in the Official Gazette RS. By a written agreement, the attorney and their client can agree to a higher payment than the payment provided for in the tariff. It is important to note that the losing party will only have to reimburse the costs of the opponent's attorney in the amount provided for in the tariff, and not the higher amount possibly provided for in the contract between the opponent and their attorney.

Art. 62 of the CRA Proposal provides the possibility for a contingency fee agreement. As in other court proceedings in Slovenia, the plaintiff and the attorney can conclude an agreement, under which the attorney will acquire no more than 15% of the amount which will be granted by the final judgment. If the attorney accepts to bear all costs of the collective proceedings in the case of the defeat of the plaintiff (i.e. also the costs incurred by the opposite party),<sup>661</sup> they may be granted up to 30% of the granted amount.

### **6. Funding**

Under Art. 59 of the CRA Proposal, the plaintiff must publicly reveal and inform the court of its source of funding for the collective proceedings. The court will not certify the collective action if, in the case of funding by a third party, it establishes: that there is a conflict of interests between the third person and the plaintiff, or that the third person does not have enough financial means to fulfil its obligations regarding the plaintiff, or that the

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<sup>659</sup> Zakon o odvetništvu (ZOdv), Official Gazette RS, No. 18/1993 of 9 April 1993, with further amendments.

<sup>660</sup> Odvetniška tarifa, Official Gazette RS, No. 2/2015 of 9 January 2015.

<sup>661</sup> CRA Proposal, p. 20.

plaintiff does not demonstrate that they have enough financial means for the reimbursement of the costs of the defendant in case of losing in the proceedings. If the third-party funder is a private law entity, such entity must not try to influence in a decisive manner the procedural choices of the plaintiff, including the decision to conclude a court settlement. They must also not finance a collective action against the defendant who is in competition with the funder, or against a defendant, of which the funder is dependant; they must also not demand interests above the legal rate for the provided financial means.

Since for the time being no collective proceedings have been initiated in Slovenia, we cannot report on the experience with the funding of such proceedings.

## **7. Enforcement of collective actions/settlements**

### **a. Framework for enforcement**

According to the CRA Proposal, in cases where the court names all members of the group and the amount that each of them is granted, such judgment is served on all group members who can start enforcement proceedings under the Slovenian Claim Enforcement and Security Act<sup>662</sup> in case the defendant does not fulfil the obligations from the judgment.

When aggregate damages are determined or where the amounts of individual damages are determined without the naming of the group members, the administrator of the collective damage will establish the list of the injured persons and will proceed, after the confirmation of the list by the court, to the individual payments.

### **b. Efficient enforcement of compensatory/ injunctive order**

Under the CRA Proposal, compensatory judgments will be enforced as stated above. The enforcement of injunctive judgments can only be requested by the plaintiff. Under the Claim Enforcement and Security Act, the enforcement will be conducted by way of monetary fines.

### **c. Cross border enforcement**

There are no special rules on cross border enforcement of judgments in collective redress. Such enforcement is regulated by the national, EU or international acts, depending on their respective scope of application.

## **8. Number and types of cases brought/pending**

Currently, only injunctive collective actions are provided for in consumer disputes. However, no such action has been filed to date.

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<sup>662</sup> Zakon o izvršbi in zavarovanju (ZIZ), Official Gazette RS, No. 51/1998 of 17 July 1998, with further amendments.

## **9. Impact of the Recommendation/Problems and Critiques, including**

### **a. Consequences where no collective redress mechanism is available**

To our knowledge, no empirical study has been made, but there is a consensus that it is important to regulate collective redress possibilities, including compensatory action, to respond to mass violations of consumers' and workers' rights, as well as the violations of antitrust, as classical mechanisms of civil procedural law do not provide an adequate response to such situations.

### **b. Impact of the collective mechanism (or lack of) on behaviour/ policy of stakeholders (direct/ indirect, economic/social impact)**

Injunctive collective claims and claims for the declaration of nullity, both in consumer disputes, have been available in Slovenia for the last 15 years, but no proceedings have been initiated under these rules. Since no claims have been concluded, the impact, if it exists, is very difficult to assess.

It must, however, be mentioned that there are several cases where consumer organisations or private persons organised the filing of individual claims by the injured persons, by providing the necessary information and the representation by a common attorney. This was successful and undoubtedly many injured persons participated who would not otherwise have initiated court proceedings. Nevertheless, contrary to the position under a collective action, it was necessary for the courts to deal with a large number of individual actions and the injured persons ran the risk of paying the defendant's costs if unsuccessful.<sup>663</sup>

### **c. Incompatibilities with the Recommendation's principles**

The CRA Proposal was prepared based on the Recommendation. Apart from not respecting the recommended period for introducing the collective redress in the national law (the new act will presumably enter into force in 2018), we have detected no significant incompatibilities with the Recommendation.

Two points could potentially prove problematic from the point of view of the recommendation. Firstly, contingency fees, which are allowed but regulated in detail, and secondly, the possibility of the opt-out type of collective redress. The Ministry addresses and thoroughly (and, in our opinion, satisfactory) explains its choices in the explanatory part of the CRA Proposal.

### **d. Problems relating to access of justice/fairness of proceedings including**

#### **Restrictions on access to justice negatively affecting collective redress**

The CPA currently in force only grants standing to bring injunctive collective actions in the area of consumer protection to already established organisations for the protection of consumers. This has proven to be insufficient, since no collective action has been filed in the 15 years since this action became available in Slovenian law. Since the mentioned regulation

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<sup>663</sup> Cf. CRA Proposal, p. 7.

proved to be insufficient, the Ministry of Justice has opted for a broader scope of qualified entities in the CRA Proposal.<sup>664</sup>

Regarding admissibility and certification conditions for collective redress in the CRA Proposal, only time will show whether they are too restrictive or not.

### **Time and burden of collective actions on courts and parties compared to non-collective litigation**

It is presumed that collective litigation will prevent the courts of being overburdened by a large number of individual claims arising from the same harmful event or practice.<sup>665</sup> However, this might also be perceived as paradoxical, since one of the main reasons for the introduction of collective redress is the fact that in many cases of mass harm, individuals would not introduce individual actions for different reasons (e. g. the amount of individual demands is too little for the potential claimants to invest time and money in legal proceedings), but it is (also) in the public interest that they act.

### **Risks of and examples of abusive litigation**

Being that there is no experience with collective litigation yet, we cannot report any examples of abusive litigation.

### **Effective right to obtain compensation**

We deem that the CRA Proposal provides for effective instruments for the adjudication of compensation in collective redress. The enforcement of the judgment is conducted by the administrator of collective damages or, in the case of individually determined amounts, the enforcement courts.

## **II. Sectoral Collective Redress Mechanism(s)**

At the time of writing, collective redress is only provided for in the Consumer Protection Act (CPA). This act regulates the injunctive collective actions and the actions for establishing the nullity of general contractual conditions or of certain contractual provisions. It is anticipated that these provisions will soon be replaced by the provisions of the Collective Redress Act, prepared by the Ministry of Justice and waiting for the confirmation of the Government in order to be sent to the Parliament for adoption.

The CRA Proposal contains provisions on collective court settlement, collective compensatory actions and collective injunctive actions. Within Chapter IV (Collective Injunctive Action), two subchapters regulate collective injunctive claims in consumer and discrimination area.

The solutions of the CPA and of the special subchapters of the CRA Proposal are included in the presentation of the general mechanisms of collective redress.

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<sup>664</sup> CRA Proposal, p. 15.  
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## **Interplay between injunctions and compensation and follow on actions**

The interplay between injunctions-compensation is discussed in the presentation of the general mechanisms of collective redress.

Art. 9 of the CRA Proposal regulates follow-on actions in the area of competition law. When proceedings are pending at the authority competent for the protection of competition regarding the determination of violation of the provisions on antitrust, the collective claim is only admissible when the said authority adopted a final decision. If the said authority starts proceedings after the filing of the collective claim, the court will stay the proceedings regarding the collective claim until the antitrust authority has adopted a final decision. If special act does not provide otherwise, the limitation period regarding the demand from the collective claim or the proposal for a collective settlement is suspended from the day when the antitrust authority performs any act with the aim of examination or proceedings regarding the violation, until the expiration of one year period after the decision on the violation has become final or the proceedings have ended in another manner.

## **III. Information on Collective Redress**

### **1. National Registry**

Art. 10 of the CRA Proposal provides for a Registry of collective claims that will be held at the Slovenian Supreme Court in electronic form. The said article contains a non-exhaustive list of the information which can be published in the registry, but the court competent for the collective claim or settlement decides which data will actually be published, so that as many members of the class will be informed. The access to all information in the registry will be free and open to everybody. The link to the registry will be available on the internet site of the judiciary, on a "visible" place.

As the establishing of the registry will open many technical questions, the CRA Proposal provides that the Ministry of Justice should adopt more detailed rules on the functioning of the registry.

### **2. Channels for dissemination of information on collective claims**

The main channel (and the only one provided for by the CRA Proposal) is the Registry of Collective Claims.

## **IV. Case summaries**

At the time of writing of this report, no collective redress actions have been filed in Slovenia, even though injunctive and declaratory actions are provided for by the CPA. The doctrine has been critical about the passivity of the

consumer associations which have standing to activate collective redress mechanisms.<sup>666</sup>

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<sup>666</sup> Galič, p. 221.



# SPAIN - FACTSHEET

## Scope

The Code of Civil Procedure provides some rules on collective redress which are considered to be of general application. However, there is no specific horizontal or general collective redress mechanism. Rules on parties having standing are sectoral only.

Mechanism only applies in consumer; competition; discrimination ; environmental and labour law

Joinder of actions under the regular civil procedure

Compensatory and injunctive relief.

## **Problems/Incompatibilities with Recommendation principles**

Collective redress rules are spread across numerous different laws and as a result are neither cohesive nor systematic.

## Standing (Para. 4-7)

**Consumer law:** legally constituted consumer and users associations, authorised public entities, Public Prosecution Service.

**Competition law:** legally constituted consumer and users associations. Depending on the type of claim associations, professional corporations or representatives of economic interests may have standing where their members are affected.

**Anti-discrimination:** Trade unions and other legally constituted associations whose primary goal is the defence of equal treatment of men and women. Public bodies

**Labour Law:** Trade unions

## **Problems/Incompatibilities with Recommendation principles**

Standing to bring actions on behalf of indeterminate groups

## Admissibility (Para. 8-9)

No formal rules regarding the admissibility of claims.

## **Problems/Incompatibilities with Recommendation principles**

No early determination of admissibility questions.

## Information on Collective Redress (Para. 10-12, 35-37)

Rules on dissemination of information are stipulated in the Code of Civil Procedure.

Law firms and consumer associations publicise potential claims.

## **Problems/Incompatibilities with Recommendation principles**

There is currently no National Registry of collective redress cases.

## Funding (Para. 14-16)

Third party funding is permitted but rarely used in practice since organisations are prohibited from making a profit.

There are a number of transparency requirements imposed on claimants to avoid abusive litigation. For instance, consumer associations are not permitted to make a profit.

### **Problems/Incompatibilities with Recommendation principles**

There is no obligation on a claimant to disclose their source of funding at the outset of a case

There is no regulation of third party funding by the court or otherwise. However, this not necessarily seen as a problem as third-party funding is so uncommon and representatives are not permitted to make a profit

#### **Cross Border Cases (Para. 17-18)**

Foreign claimants can participate in collective proceedings. There not been any cases involving foreign parties to date.

#### **Expedient procedures for injunctive orders (Para. 19)**

Article 727.7 CCP provides for a provisional injunction ordering a defendant to cease an activity. This may be granted prior to the commencement of proceedings and in exceptional urgency may be granted on an *ex parte* basis.

### **Competition**

In competition cases an interim prohibitory order can be obtained from the CNMC.

#### **Efficient enforcement of injunctive orders (Para. 20)**

Legislation provides for a fine of between €60,000 and €600,000 per day for failure to comply with an order or injunction.

#### **Opt In/Opt Out (Para. 21-24)**

There is no express rule. However, recent case law suggests that the system should be interpreted as an opt-in model due to its compatibility with non-party claimants bringing independent actions.

#### **Collective ADR and Settlements (Para. 25-28)**

During the preliminary hearing, before the trial the parties are informed of the possibility of resolving the dispute by negotiation and the hearing is conducted in such a way as to attempt to reach an agreement between the parties.

#### **Costs (Para. 13)**

The loser pays principle applies

### **Problems/Incompatibilities with Recommendation principles**

Lack of clear rules leads to uncertainty regarding the *res judicata* effect of decisions in collective cases.

#### **Lawyers' Fees (Para. 29-30)**

Contingency fees are available.

Fees cannot exceed more than one third of the total amount of the claim.

### **Problems/Incompatibilities with Recommendation principles**

The courts do not exercise any supervision over funding agreements.

#### **Prohibition of punitive damages (Para. 31)**

Extra-compensatory damages are not available.

#### **Collective Follow- on actions (Para 33-34)**

Follow on actions are possible in competition law cases. There is a limitation period of 1 year for bringing any claims starting from the date of the binding decision confirming the infringement.

#### **Interplay between injunctions and compensation across all sectors**

It is possible to claim damages and an injunction in one action.

An injunction may be relied upon in a separate, collective, action. However, this has never been successfully pursued in practice.

# Spain- Report

## I. General Collective Redress Mechanisms - Joinder of actions and joinder of proceedings<sup>668</sup>

Under the general rules of the CCP and from a horizontal perspective, joinder of actions and proceedings are generally available for individuals.<sup>669</sup> According to Article 72 CCP, 'actions may be joined and simultaneously brought against several or single subjects, as long as such actions have some sort of link or grounds on the basis of a title or the causes of plea'. In this regard, the title or ground must be 'identical or connected where the actions are grounded in the same facts'. Generally, Article 73 CCP establishes a series of requisites to be met in order to admit a joinder of actions: (i) the Court should deem that it enjoys jurisdictions and competence over the same action due to the matter at issue or due to its amount in order to deal with the joined action or actions; (ii) the joined actions may not, for reasons of their subject matter, be heard in trials of a different kind; and (iii) that the law does not prohibit joinder in cases where specific actions are brought due to reasons of the matter at stake or due to the kind of proceedings that have to be followed.

Furthermore, Articles 74 ff CCP regulate the joinder of proceedings. By virtue of this joinder of proceedings, these proceedings are conducted in a single procedure and brought to a close through a single judgement. This joinder may be requested by a party or parties to the proceedings whose joinder is sought or agreed upon on an *ex officio* basis by the Court, where the circumstances set forth in Article 76 CCP are met. Interestingly, this provision in its paragraph 2. (i), refers to the joinder where proceedings have been brought to protect collective or diffuse rights and interests granted by the law to consumers and users.<sup>670</sup>

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<sup>668</sup> This report has been prepared by Marta Otero Crespo (Universidade de Santiago de Compostela). This report is based on a series of previous works: M. Requejo Isidro/ M. Otero Crespo, 'Collective redress in Spain: recognition and enforcement of class action judgments and class settlements', in D. Fairgrieve/ E. Lein (eds), *Extraterritoriality and collective redress*, Oxford University Press, 2012, 309-331; M. Otero Crespo, 'Las acciones colectivas en Europa: ¿un paso adelante? Las líneas generales propuestas en la Recomendación de la Comisión Europea sobre los principios comunes aplicables a los mecanismos de recurso colectivo de cesación o de indemnización en los Estados miembros en caso de violación de los derechos reconocidos por el Derecho de la Unión (2013/396/UE)', *Boletín del Centro de Documentación Europea*, USC, 2013; M. P. García Rubio/ M. Otero Crespo, 'Rebuilding the pillars of collective litigation in light of the Commission Recommendation: The Spanish approach to collective redress', in E. Lein/ D. Fairgrieve/ M. Otero Crespo/ V. Smith (eds), *Collective redress in Europe – Why and How?*, BIICL, London, 2015, 133- 152; M. Otero Crespo, 'The collective redress phenomenon in the European context: The Spanish Case', in L. Cadet/ B. Hess/ M. Requejo Isidro (eds.), *Procedural Science at the Crossroads of Three Generations*, Ed. Nomos, Baden- Baden, Germany, 2015, 193-224; M. Otero Crespo, 'Ignorancia de la ley, error y tutela jurisdiccional de los consumidores: el puzzle de las acciones colectivas en la LEC', *Teoría y Derecho*, 18/2015, 130-141.

<sup>669</sup> See Articles 71 ff CCP.

<sup>670</sup> Article 76 CCP. Circumstances in which the joinder of proceedings may proceed.

'1. The joinder of proceedings may be agreed upon whenever:

From a sectoral perspective, Article 53 of the Revised Text 1/2007 of the General law for the Protection of Consumers and Users (GCA)<sup>671</sup> also stipulates a joinder of claims. In this regard, any prohibitory action (injunction) may be joined where actions are filed for nullity and voidability, non-performance of obligations, termination or rescission of contract or the return of amounts charged in relation to the conduct or clauses or general terms found to be unfair or non-transparent, and also for compensation for damages or losses caused by the application of such clauses or practices.<sup>672</sup> Furthermore, any prohibitory action (injunction) brought by consumer and user associations may be joined by actions for nullity and voidability, non-performance of obligations, termination or rescission of contract or the return of amounts charged in relation to the conduct or clauses or general terms found to be unfair or non-transparent, and also for compensation for damages caused by the application of such clauses or practices.<sup>673</sup>

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- (i) The judgement to be issued in one of the proceedings may bring about injurious effects on the other.
  - (ii) Such connection exists between the matters at issue in the proceedings whose joinder is sought, so that, if they are conducted on a separate basis, judgments containing contradictory, incompatible or mutually exclusive decisions on grounds may be issued.
2. Joinder may also be given leave to proceed under the following circumstances:
- (i) Where proceedings have been brought to protect collective or diffuse rights and interests granted by the law to consumers and users, which may be joined in accordance with the provisions of paragraph 1.1 of this article or in Article 77 whenever the diversity of proceedings has been impossible to avoid through the joinder of actions or the intervention provided for in Article 15 of this Act.
  - (ii) Where the matter at issue in the proceedings is to contest corporate resolutions adopted at the same Meeting or Assembly or at the same meeting or a collegiate body of governance. In this event, all the proceedings initiated through claims seeking a declaration that such decisions are null and void or voidable shall be joined, as long as such claims are brought within a time limit not exceeding forty days from the date the first claim was brought.
    - (iii) Where proceedings have been brought in which objection to administrative resolutions regarding protection of minor is substantiated, processed in accordance with article 780, as long as none of them have started to heard.
- At any event, in places where there is more than one Court having jurisdiction in company matters, in the cases of numbers (i) and (ii) or, in civil matters, in the case of number (iii), claims lodged after another claim will be distributed to the Court where the first should have been heard'.

<sup>671</sup> *Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias.*

<sup>672</sup> This joined action shall be heard before the same Court that is dealing with the main prohibitory action, according to the proceedings provided for in procedural law.

<sup>673</sup> See below and fn 37.

## **II. Sectoral Collective Redress Mechanism(s)**

### **A Consumer Law**

#### **1. Scope/ Type**

##### **a. Horizontal/ sectoral**

It should be noted that Consumer law was the first area to deal with collective litigation and, in fact, it is the most relevant in practice.<sup>674</sup> In this regard, it may be stated that the general regulation on collective redress under Spanish law is designed to provide for collective redress in consumer law cases but not limited to that scenario, as far as some general rules are of application to other legal spheres.<sup>675</sup>

As already mentioned under Section I, there is a clear lack of harmonized and methodical treatment since the applicable rules are dispersed through the legal system, and even within the text of the relevant statutes (CCP and consumer law provisions). This heterogeneous legal landscape makes it difficult to conduct a systematic study on the topic.

##### **b. Injunctive or compensatory or both.**

On remedies, both injunctive and compensatory relief are available under the application of the CCP and specific Consumer law rules (for further details see below).

#### **2. Procedural Framework**

##### **a. Competent Court**

There is no special jurisdiction dealing with consumer collective redress cases. Civil courts are the common jurisdiction (commercial courts *ex* Article 86. *ter* b) of the Organic Law 6/1985, of the Judicial Power as amended in 2015)<sup>676</sup> with the exception of potential civil liability arising from a crime, where criminal courts may have competence. Furthermore, administrative courts may also be competent in cases where the Public administration is the defendant.

Additionally, some cases may fall under the special rules on territorial jurisdiction (Article 52.1 paragraphs 14 and 16 CCP).

##### **b. Standing**

On standing, 'notwithstanding the individual standing of those aggrieved', Article 11 CCP grants standing for the protection of rights and interests of

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<sup>674</sup> Please note that the distinction between consumer law, financial law and product liability law cases remains unclear under certain circumstances. When consumers are involved, they have been classified as consumer law cases. In fact, in light of the financial crisis, collective redress actions have become popular in financial and banking services contracts (mainly, abusive clauses in banking contracts – floor clauses-, product liability and financial contracts related to service contracts).

<sup>675</sup> See, for instance, T. Armenta Deu, *Acciones colectivas: reconocimiento, cosa juzgada y ejecución*, Ed. Marcial Pons, Madrid, 2013 at 99.

<sup>676</sup> *Ley Orgánica 1/1985, de 1 de julio, del Poder Judicial*.

consumers and users to legally constituted consumer and user associations. These shall be empowered to defend in Court the rights and interests of their members and of the association itself, as well as the general interests of consumers and users.

When those damaged by an event are a *group of consumers or users whose components are perfectly determined or may be easily determined*, the standing to apply for the protection of these collective interests corresponds to:

- (1) associations of consumers and users, to the
- (2) entities legally constituted whose purpose is the defence or protection of these, and
- (3) the groups affected<sup>677</sup> (Article 11.2 CCP).

In cases of *collective and diffuse interests*, when the identity of the injured parties is not easy to ascertain, only associations that are representative (see below Article 24 GCA) in accordance with the law may file a claim (Article 11.3 CCP).

Furthermore, authorized public entities (Article 6.1.8 CCP)<sup>678</sup> may also start proceedings to defend collective and diffuse interests of consumers and users. However, these entities can only file actions asking for injunctive relief.

Finally, the Public Prosecution Service may also file any type of claim to defend consumer and user rights, including either injunctive or compensatory relief (Article 11.5 CCP).<sup>679</sup>

It should be highlighted that, leaving aside the CCP, some consumer law rules include particular provisions on legal standing. For instance, Articles of the 54 GCA, Article 12 ACGC or Article 33 UCA.<sup>680</sup>

### **c. Availability of Cross Border collective redress**

There is no special regulation covering cross border collective redress. Participation of foreign claimants is possible according to the general rules of private international law, but so far there have not been any collective actions with a cross boarder element in Spain.

### **d. Opt In/ Opt Out**

There is no express rule in Spain specifically applying either of these mechanisms. In fact both options may be available depending on the interpretation provided. Leaving aside the intervention of the Public

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<sup>677</sup> Article 6.1.7 CCP recognises capacity to be a party in civil proceedings to the groups of consumers or users affected by a damaging event, when the parties are determined or may be easily determined. To lodge a claim it is required that the group is constituted by the majority of those affected.

<sup>678</sup> Article 6.1.8 CCP refers to 'the entities authorised pursuant to European Community Regulations to exercise cessation in defence of collective interest and the diffuse interest of consumers and users'.

<sup>679</sup> As mentioned earlier, this paragraph was amended in 2014 and prior to this amendment the Public Prosecution Service was only entitled to file actions looking for injunctive relief. The Preamble of Act 3/2014 does not provide details on this procedural change. See F. Cordon Moreno, 'Reformas procesales introducidas por la Ley 3/2014, de 27 de marzo. En especial, la legitimación del Ministerio Fiscal para el ejercicio de las acciones en defensa de los consumidores', *Revista CESCO de Derecho de Consumo*, N° 9/2014, 1-6 (available at <https://www.revista.uclm.es/index.php/cesco>).

<sup>680</sup> Please note that this provision will be analysed under the relevant section.

Prosecution Service, when an individual plaintiff, an association, legal entity or group, has brought proceedings the remaining aggrieved parties can join the claim, thus assuming the personal defence of their interest in court. However, it is not clear what happens if an aggrieved individual does not take part in the proceedings. In this context some scholars have asserted that the Spanish system advocates an opt-out *sui generis* regime under those circumstances.<sup>681</sup> Nevertheless, this solution has been heavily criticised as putting fundamental procedural rights at stake (for example the right of access to justice, due process, etc.).<sup>682</sup> Taking into account the fundamental procedural rights granted by the Spanish Constitution, it might not be stated that a non-party to a process is bound by its final outcome, irrespectively of the interpretation provided.<sup>683</sup>

Article 15 CCP allows for injured parties – other than the plaintiff- to choose between joining the proceedings and delegating their defence to the current plaintiff. The issue is whether or not those injured parties may successfully file a separate claim, that is, whether the new action would be 'neutralized' by the stay of proceedings, *lis pendens* or *res judicata* replies. This question has been recently addressed by the CJEU in 2016. The CJEU in its judgment of the First Chamber of 14 April 2016 (*Jorge Sales Sinués v. Caixabank SA (C-381/14)*, and *Yousouf Drame Ba v Catalunya Caixa SA (Catalunya Banc SA) (C-385/14)* joined cases C-381/14 and C-385/14)<sup>684</sup> examined the requests for a preliminary ruling concerning the interpretation of Article 7 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. The requests had been made in proceedings between two individual claimants and a financial institution, both relating to the annulment of contractual terms in mortgage loan agreements. Prior to those actions, a consumer association (ADICAE) had brought a collective action against 72 banking institutions seeking, *inter alia*, an injunction prohibiting the continued use of 'floor' clauses in loan agreements. Basing themselves on the CCP, the defendants in the main proceedings required the suspension of the individual actions brought before the court until such time as a final judgment on the collective action had been delivered. The question was whether the individual action was subordinated to the collective action, as regards both the course of the proceedings and the outcome. In those circumstances the Commercial Court Number 9 of Barcelona decided to stay the proceedings. The CJEU decided that 'Article 7 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as precluding a provision of national law, such as that at issue in the main proceedings, which requires a court, before which an individual action has been brought by a consumer seeking a declaration that a contractual term binding him to a seller or supplier is unfair, automatically to suspend such an action pending a final judgment concerning an ongoing collective action brought by a consumer association on the basis of Article 7(2) of Directive 93/13 seeking to prevent the continued use, in contracts of the same type, of terms similar to those at

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<sup>681</sup> F. Gascón Inchausti, *Tutela judicial de los consumidores y transacciones colectivas*, Ed. Civitas, Madrid, 2010, at 26, where the author asserted that the Spanish system is based on an opt-out model (however, the legal design is not complete).

<sup>682</sup> See Article 24 of the Spanish Constitution and also Article 6 of the European Convention of Human Rights and Article 47 (1) of the Charter of Fundamental Rights.

<sup>683</sup> M. Otero Crespo, 'The collective redress phenomenon in the European Context: the Spanish case', at 213.

<sup>684</sup> ECLI:EU:C:2016:252. Official Journal of the European Union 13.6.2016. Decision available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014CJ0381&from=ES>.



issue in that individual action, without the relevance of such a suspension from the point of view of the protection of the consumer who brought the individual action before the court being able to be taken into consideration and without that consumer being able to decide to dissociate himself from the collective action'.<sup>685</sup>

The interpretation provided by the CJEU has been followed by the Spanish Constitutional Court (Decision 148/2016, of 19 September)<sup>686</sup>. In a '*recurso de amparo*' where the fundamental right of access to justice (*tutela judicial efectiva* ex Article 24 of the Spanish Constitution) was at stake, the Constitutional Court has considered that the existence of a collective action does not prevent individual actions as both actions are independent of each other, they have a different nature and content and that the control exercised by the judge in the context of a collective action and that exercised in the context of an individual action diverge.

Until the CJEU decision of April 2016, the Spanish Courts had issued contradictory decisions regarding the application of the *lis pendens*, stay of proceedings or *res judicata*. Regarding the latter, Article 222.3 CCP extends the *res judicata* effect to any non-litigants holding rights upon which the parties' capacity to act is grounded in accordance with Article 11 CCP. This material *res judicata* effect is still controversial and may conflict with the recent case law on the compatibility of collective and individual actions.

A recent Supreme Court decision of 24 February 2017<sup>687</sup> has established that a joint interpretation of Articles 15, 222.2 and 221 CCP leads to the conclusion that, when a collective action (*acción colectiva*) is filed, the *res judicata* effect of the corresponding judgment upholding the claim only affects those absent consumers (*consumidores no personados*) who are individually

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<sup>685</sup> See also the order of the Court of 26 October 2016. In its decision in joined cases C-568/14 to C-570/14, the Court (Fifth Chamber) considered that 'Article 7 (1) of Council Directive 93/13/EEC of 5 April 1993, on unfair terms in consumer contracts, must be interpreted as precluding a provision of national law, such as that at issue in the main proceedings, which does not permit a court seized of an individual action brought by a consumer seeking a declaration that a term of a contract binding him to a seller or supplier is unfair to adopt interim relief of its own motion, for as long as it considers appropriate, pending a final judgment in an ongoing collective action, the outcome of which may be applied to the individual action, when such relief is necessary in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed by the consumer under Directive 93/13'. The requests for a preliminary ruling concerned (again) the interpretation of Article 7 of Directive 93/13/EEC on unfair terms in consumer contracts. The applicants in the main proceedings before a Commercial Court in Barcelona have brought individual actions claiming that the 'floor' clauses at issue were unfair within the meaning of the Directive 93/13; the defendants in the main proceedings (financial institutions), indicated that a collective action with the same subject matter was pending before a Commercial court in Madrid. As a consequence, they sought to have the actions in the main proceedings suspended pending a final judgement disposing of the collective action. This decision is available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62014CO0568\(01\)&from=ES](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62014CO0568(01)&from=ES)

<sup>686</sup> See F. Córdón Moreno, 'Acción colectiva y acción individual para la tutela de los derechos de los consumidores: relación entre ambos procesos', *Centro de Estudios de Consumo*, 1-4. Available at: <http://blog.uclm.es/cesco/files/2016/12/Accion-colectiva-y-accion-individual-para-la-tutela-de-los-derechos-de-los-consumidores.pdf>. On the same topic, see also Decisions 206/2016, 207/2016 and 208/2016, of 12 December. The Constitutional Court decisions are available at: <https://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencias.aspx> (in Spanish).

<sup>687</sup> STS 477/2017 (ECLI:ES:TS:2017:477). See also the Supreme Court Decision (Civil Chamber) of 9 March 2017 (STS 788/2017. ECLI:ES:TS:2017:788).

determined in the text of the judgment ex Article 221.1.1 CCP. This decision has adapted the Supreme Court doctrine to the CJEU ruling of 21 December 2016. In this judgment, the CJEU declared that 'national case-law, such as that following from the judgment of 9 May 2013 [*collective claim*- emphasis added], concerning the temporal limitation of the legal effects resulting, in accordance with Article 6(1) of Directive 93/13, from the finding that a contractual term is unfair, ensures only limited protection for consumers who have concluded a mortgage loan contract containing a 'floor clause' before the date of the judgment in which the finding of unfairness was made. Such protection is, therefore, incomplete and insufficient and does not constitute either an adequate or effective means of preventing the continued use of that type of term, contrary to Article 7(1) of Directive 93/13'.

On the *res judicata* effect, the recent *Auto* case in the Supreme Court (Civil Chamber) of 19 of April 2017<sup>688</sup> has dismissed an appeal, rejecting a review of a case on floor clauses ruled before the judgment of the CJUE of 21 December 2016 recognizing the total retroactivity of the nullity of the floor clauses. The Supreme Court states that it is not possible to obtain a review of a final judgment on the grounds that a subsequent judgment establishes jurisprudence incompatible with the reasoning of the previous one. The latter judgment is therefore not considered a 'document' for the purposes of Article 510 CCP.<sup>689</sup>

### **Specific measures related to the fact that affected persons are not identifiable**

Finally, it should be noted that Article 15 CCP establishes a series of measures aiming at identifying the aggrieved parties (For further details see below e. Main procedural rules). Furthermore, Article 256.1.6 CCP provides for a preliminary investigation with the aim of identifying the aggrieved parties when they may be easily singled out (i.e., when collective interests are at stake). The Court shall take the appropriate measures to verify the members of the group in accordance with the circumstances of the case and the details provided by the applicant, including a request to the defendant to cooperate in order to determine the aggrieved parties.<sup>690</sup>

#### **e. Main procedural rules**

##### **Admissibility and certification criteria.**

Under Spanish law certain requisites must be met in order to file a claim to protect consumer and user interests. For instance, consumer associations entitled to issue a representative claim are defined in Article 23 GCA. In this regard, they must have legal ability, be not-for-profit and have as one of their objectives the protection of consumer interests. On standing, under Article 24 GCA, in cases of collective and diffuse interests, if the identity of the injured parties is not easy to ascertain, only associations that are representative in accordance with the law may file a claim (adequacy of representation). For the purposes of Article 11.3 CCP, associations which are members of the Consumers and Users' Council hold the legal status of representative

<sup>688</sup> ATS 3444/2017. ECLI:ES:TS:2017:3444A.

<sup>689</sup> See Articles 519 ff CCP on the review of final judgments.

<sup>690</sup> See, for instance, the Constitutional Court decision of 7 May 2012 (STC 96/2012) where the Court analyses the compatibility between this preliminary measure and the protection of personal data. In the case, a consumer association (*Ausbanc*) filed a request before a Court in Madrid addressed to a bank (BBVA) in order to identify the clients who had acquired a specific financial product.

associations as requested by Article 23 GCA – except where the geographical scope of the dispute basically affects an Autonomous Community, in which case they will be subject to its specific legislation. To become a member of that Council is necessary to fulfil certain requirements. It should be noted that the Spanish legislation clarifies that those associations that do not meet the requirements described in the GCA or applicable regional legislation shall only be able to represent the interests of their members or of the association, but not the general, collective and diffuse interests of consumers (Article 24.1 GCA). Furthermore, when these associations breach any of the legal prohibitions, they lose their status as a consumer and user association for a period of not less than five years following the cessation of such circumstances (Article 26 GCA).

In order to prevent conflict of interests, Article 27 GCA imposes on consumer and user associations some independence requirements. For instance, consumer and user associations shall not include profit-making legal persons as members, receive economic or financial assistance from companies or group of companies that supply goods or services to consumers or users, engage in commercial communications in respect of goods and services, act with manifest recklessness, from a legal perspective, as an organisation or through its legal representatives, etc.

### **Single or Multi-stage process**

There is no specific regulation on the stages of the process. According to Article 11 CCP, procedural steps may vary depending on the type of action brought before the Courts (to protect collective or diffuse interests or compensatory or injunctive relief). Ordinary procedural rules are applied here.

### **Case-management and deadlines**

Article 15 CCP stipulates rules regarding the publication of proceedings and to make the intervention of the affected persons in the collective proceedings possible. In this regard, when proceedings are brought by associations or entities constituted for the protection of the rights and interests of consumers and users or by groups affected, aggrieved parties will be summoned to the hearing in order to claim their individual interests. This general announcement or call shall be made by the Court Clerk (*Letrado de la Administración de Justicia*), publishing the admission of the claim in the local media where the damage has occurred. The wording does not expressly mention the requisites to be met when publicizing the admission of the claim, who should pay for it, which media should be used – TV, internet, newspapers, official journals, etc.-, or what information should be communicated.

In addition to this general call, the CCP establishes some specific rules depending on whether the aggrieved parties are known (determined) or easily determined, or whether they are an indeterminate number of persons or a number which is difficult to determine. If the aggrieved parties are determined or easily determined, the CCP places an additional informative burden upon the claimant, who is required to communicate their intention to file the claim to the other aggrieved persons who are known prior to the general announcement. After this call, the consumer or user may join the proceedings any time but will only be allowed to undertake those procedural steps that have not yet been precluded. The CCP does not specify the type of notification (a personal notice or not) nor the content to be communicated. If

the damage is caused to an indeterminate number of persons or a number which is difficult to ascertain, the court shall suspend the proceedings for a period of up to two months, depending on the relevant circumstances of the case. The Court Clerk shall decide the exact timing taking into account the complexity of the event and the difficulties in finding those damaged. The proceedings shall resume with the intervention of all the consumers who have obeyed the call, and the individual appearance of consumers and users shall not be allowed subsequently – notwithstanding the fact that these may assert their rights or interests in accordance with the provisions of Articles 221 and 519 CCP herein.

### **Expediency (particularly in injunctive cases)**

Injunctions may be requested together with the main claim. Nevertheless, they may also be sought prior to the claim if the applicant alleges and evidences reasons of urgency or necessity (730 CCP). Generally, the Court makes an order after hearing the defendant. However, if the applicant requests and evidences the existence of reasons of urgency or that the hearing may jeopardize the efficiency of the injunction, the Court may order the injunction without further hearing within a time limit of 5 days (Art. 733 CCP)

### **Evidence/discovery rules**

There are no specific evidential rules in respect of collective proceedings. However, Articles 217.6 and 7 CCP include special rules about the burden of proof that can be used in collective proceedings. It should be noted that under Spanish law there is no obligation to disclose documents to claimants through 'discovery' as this institution is mostly unknown. However, as stated above, according to Article 256.1.6 CCP, the Court may order a request to the defendant to cooperate in order to determine the aggrieved parties. Furthermore, Articles 293 ff CCP allow for an advanced examination and seizure of evidence.

### **Interim measures**

The general rules on interim measures apply, the Code of civil procedure (CCP) states that any claimant may seek an injunction from the Court for precautionary measures he may deem necessary to ensure the effective protection of the courts. Furthermore, Article 727.7 CCP provides for a specific injunction ("The court order to provisionally cease an activity, that of temporarily abstaining from performing a certain conduct or the temporary prohibition to suspend or to cease carrying out a performance that was being carried out").

### **Settlements**

There are no special rules on settlements in collective redress cases so the general rules of civil procedure apply (Civil code and CCP). In this regard, Courts do not control out-of-court settlements. However, a Court may approve certain settlements. According to Article 19 CCP, a settlement may be reached at any time during the proceedings and even after judgment. Then the parties may bring the settlement contract before the competent court. In these cases, the Court will not validate/ approve that settlement if the law prohibits the right to dispose of the subject matter of the

proceedings, or sets forth limitations for reasons of general interest or to the benefit of a third party. Court rulings that approve or validate court settlements are considered enforcement orders (res judicata effect). See also below Article 415 CCP.

Additionally, the CCP states that during the preliminary hearing before the trial "if they had not been informed beforehand, the parties shall be informed in the summons of the possibility of engaging in negotiations in an effort to resolve the dispute, including the recourse to mediation (...)" (Article 414.1 paragraph 2 CCP); "the hearing shall be conducted in accordance with the provisions set forth in the following articles in order to attempt to reach an agreement or settlement between the parties which brings the proceedings to an end (...)" (Article 414.1 paragraph 3 CCP); and finally, depending on the matter at stake in the proceeding, the Court may invite the parties to attempt to reach an agreement which brings the proceedings to an end, where appropriate through a mediation procedure, urging them attend an informative session (Article 414.1 paragraph 4 CCP). Article 415 CCP regulates the "Attempt at conciliation or settlement. Dismissal due to abandonment by the parties. Validation and effectiveness of the agreement". In summary, the parties may declare that they have reached an agreement, or show they are ready to do so immediately. If so, they may abandon the proceedings and seek the Court's validation on the matters agreed upon. This agreement validated by the Court "shall have the effects granted by the law to court settlements and may be put into effect through the procedures laid down to execute judgments and court-approved agreements (...)". Furthermore, Article 428 CCP establishes that (under certain circumstances) "in the view of the matter at issue, the court may urge the parties or their representatives and attorneys to come to an agreement to bring the dispute to an end. Should it be the case, the agreement set forth in Article 415 herein shall apply".

## **Available Remedies**

### **a. Type of damages**

From a general perspective, and according to the prevailing function of tort law in Civil law countries, only compensatory damages (including a broad approach to moral damages) are available.

### **b. Allocation of damages between claimants for compensatory claims/ distribution methods.**

According to Article 221 CCP, in claims for a monetary award (or personal services), the judgment upholding the claim shall determine the conditions to be met in order to be eligible for payment. Nevertheless, Article 519 CCP establishes that in those cases where consumers who are to benefit from the judgment cannot be identified, the enforcement court will issue an order on whether the requirements established in the judgment are satisfied. It should be highlighted that the Public Prosecution Service also has standing to seek enforcement on behalf of the consumers and users affected.

**c. Availability of punitive or extra-compensatory damages and their conditions**

Punitive or extra- compensatory damages are not available in collective redress cases as these are (still) considered an alien institution to our system.<sup>691</sup>

**d. Skimming-off/ restitution of profits**

There are specific rules allowing the recovery of sums unduly paid by the aggrieved parties. For instance, Article 12.2 SFCA or Article 36 of the Consumer Credit Contracts Act (CCCA)<sup>692</sup> expressly recognises that possibility to the affected parties, and furthermore, Article 53 GCA permits a joinder of actions to claim, inter alia, the return of amounts charged in relation to the conduct or clauses or general terms found to be unfair or non- transparent. The UCA is drafted in similar terms (see below Section III.2.).

**e. Injunctions**

As set out above, injunctive relief is also available in consumer redress cases. Injunctions are aimed at obtaining a judgement ordering the defendant to cease from conduct and to prohibit the future repetition thereof (see above Article 53 GCA).

**f. Possibility to seek an injunction and compensation within one single action**

Joinder of claims (joinder of actions) is available under Article 53 GCA. In this regard, 'any prohibitory action brought by consumer and user associations may be joined by actions for nullity and voidability, non- performance of obligations, termination or rescission of contract or the return of amounts charged in relation to the conduct or clauses or general terms found to be unfair or non- transparent, and also for the compensation for damages caused by the application of such clauses or practices'.<sup>693</sup>

**g. Possibility to rely in an injunction in separate follow-on individual or collective damages actions**

Follow-on actions initiated by consumer associations have been rarely used in practice. The first 'public attempt' was in 2007 (*Ausbanc* filed a follow- on action against *Telefónica*), but the action was dismissed by the Commercial Court No. 4 of Madrid in October 2012. In 2015, *OCU* ('*Organización de consumidores y usuarios*') announced its intention to bring a collective damage claim representing consumers against the different car dealers of different car brands having being fined by different CNMC<sup>694</sup> decisions (see below for further details).

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<sup>691</sup> Nevertheless, some forms of over compensation are allowed under Spanish law. See M. Otero Crespo, 'Punitive damages under Spanish law: a subtle recognition?' in R.C. Meurkens/ E. Nordin (eds), *The Power of Punitive Damages. Is Europe Missing Out?*, Intersentia, 2012, 283- 310.

<sup>692</sup> *Ley 16/2011, de 24 de junio, de contratos de crédito al consumo*.

<sup>693</sup> See also Article 12 SFCA and Article 29 CCCA.

<sup>694</sup> *Comisión Nacional de los Mercados y de la Competencia*, (the Spanish National Authority for Markets and Competition).

## **h. Limitation periods**

General limitation periods apply to claims asking for compensatory collective redress. According to the general rules of the Civil code: 5 years in contractual claims (Article 1964 CC) or 1 year for tort claims (Article 1968 CC). However, declaratory actions asking for injunctive relief are imprescriptible.<sup>695</sup>

## **3. Costs**

### **Basic rules governing costs and scope of the rules**

Act 1/1996 on Free Legal Assistance<sup>696</sup> provides the right to apply for free justice benefits to associations declared to be in the public interest or foundations registered in the corresponding administrative register if they cannot afford to litigate.<sup>697</sup> The claimant party might be obliged to post security. Nevertheless, in the procedures in which an action for cessation (injunction) is filed in defence of the collective interests and the particular interests of consumers and users, the court may exempt the applicant from the obligation to post security (taking into account the circumstances of the case, the financial significance and social repercussions of the various interests affected – Article 728 CCP).

## **4. Loser Pays Principle**

The 'loser pays principle' applies as a general rule under Spanish law. Nevertheless, the CCP allows some exceptions. For instance, when the court considers and reasons that the case is legally doubtful (i.e, may pose serious *de facto* or *de iure* doubts), the losing party will not be ordered to pay the costs (for further details see Article 394 ff. CCP).

## **5. Lawyers' Fees**

Contingency fees or *quota litis* agreements are considered valid in Spain (lost cases included) after the decision of the Administrative Chamber of the Supreme Court of 4 November 2008.<sup>698</sup> This has been followed in subsequent Supreme Court decisions.

It should be highlighted that when giving effect to the 'loser pays' principle, there is a cap on the fee set in Article 394.3 CCP. According to this provision, the losing party cannot be obliged to pay more than one third of the total amount of the claim to the other party's lawyer. Additionally, Spanish bar associations publish guidance rules on the recoverability of legal costs.

## **6. Funding**

Third party funding is largely unknown in Spain, but it would be considered generally valid, as it is not prohibited itself. As previously stated, in the case of representative actions brought by consumer and user associations, the GCA imposes a series of independence and transparency requirements which

<sup>695</sup> See Articles 56 GCA and 19 ACGC.

<sup>696</sup> *Ley de justicia gratuita 1/1996, de 10 de enero.*

<sup>697</sup> See also Article 37 GCA.

<sup>698</sup> STS 6610/2008. ECLI:ES:TS:2008:6610.

may be related to third party funding. In this regard, Article 27 GCA establishes that consumer associations shall not, for instance, include profit-making legal persons as their members or receive economic or financial assistance from companies or groups of companies that supply goods or services to consumers or users. These measures are aimed at preserving the independence of the association. However, there is one exception, as contributions made in accordance with the transparency conditions established by the law and the regulatory standards, which do not undermine the independence of the association and which are the result of cooperation agreements are not considered as financial assistance.

## **7. Enforcement of collective actions/settlements**

On enforcement, there is not a specific and systematic regime applicable to collective redress cases. Nevertheless, the CCP does establish a series of rules, namely the abovementioned Articles 221.1.1 and 519 CCP.

According to Article 221 CCP (judgments issued in proceedings brought by consumer or user associations), where a monetary sanction have been sought for doing or failing to do a specific or generic thing, the judgment upholding the claim shall individually determine the consumers and users who shall be deemed as benefiting from the judgment; if individual identification is not or may not be possible, the judgment shall set forth the conditions to be met in order to be eligible for payment or, as appropriate, apply for enforcement or be a party to it. Furthermore, should a specific activity or behaviour be considered illegal, the judgment shall determine whether such verdict shall have procedural effects beyond those who had been a party to the corresponding proceedings. And finally, where individual consumers or users have joined the proceedings, the judgment shall expressly issue a ruling on their pleas.

In the case of injunctions, the Court may order the full or partial publication of the judgment at the defendant's expense or, where the effects of the infringement may persist over time, a rectifying statement. In order to ensure the effective compliance with the injunctive order, the CCP establishes that a judgement upholding an actions for cessation in defence of collective interests and of the diffuse interests of consumers and users, may impose a fine ranging from sixty thousand to six hundred thousand euros per day of delay in the enforcement of the court decision within the time limit set forth therein, depending on the nature and significance of the damages caused and the economic capacity of the party thus condemned. This fine is to be paid to the Public Treasury (Article 711 CCP).

Article 519 CCP establishes that in those cases where consumers who are to benefit from the judgment cannot be identified, the enforcement court will issue an order on whether the requirements established in the judgment are satisfied. It should be highlighted that the Public Prosecution Service also has standing to seek enforcement on behalf of the consumers and users affected.

There are no cases dealing with cross border enforcement so far.

## **8. Number and types of cases brought/pending**

Over the last few years, in light of the Spanish financial crisis, collective redress has become a hot topic, especially when referred to the context of



financial and banking services contracts (see also product liability cases reported in Section V). In particular, a not insignificant number of collective redress proceedings (typically initiated by consumer associations) have been brought for abusive clauses in banking contracts (preference shares or floor clauses in contracts), asking not only for injunctive relief but also for monetary compensation. However, these collective/ representative actions have co-existed with multiple individual actions – probably hundreds of individual claims. This feature might indicate that the current collective redress ‘scheme’ needs to be amended in order to facilitate a coherent and complete system aimed at restoring the aggrieved parties. The existing provisions were not designed to be applied to collective litigation – with only a few exceptions-, probably because the minds of the drafters of the CCP in 2000 were thinking of traditional forms of litigation.

Since 2013 the Spanish Supreme Court has given judgment in ‘many’<sup>699</sup> famous cases (see Section V) and even its doctrine has been modified by the case law of the CJEU. First instance court decisions (Civil or Commercial tribunals) have also become the centre of unusual media attention. For instance, in 2010 ADICAE – on behalf of more than 15,000 consumers- filed a claim against financial entities asking for the annulment of the so-called floor-clauses and the recovery of the amounts unduly paid based on the existence of such clauses. The Commercial Court of Madrid number 11 admitted (partially) the claim in its decision of 7 April 2016.<sup>700</sup>

## **9. Impact of the Recommendation/Problems and Critiques, including**

### **a. Impact of the collective mechanism (or lack of) on behaviour/ policy of stakeholders (direct/ indirect, economic/social impact)**

As already described, forms of collective litigation are available under Spanish law but the legal system does not provide for a proper and coherent *general* collective redress mechanism. The existing rules on collective redress were designed for consumer law cases but nowadays it is clear that it is also possible to use these collective claims in other ‘non- typical’ scenarios. However, the existing collective redress ‘regime’ has been heavily criticised namely by academics, lawyers, members of the public prosecution service, judges and representative entities, and in fact, many individual lawsuits are still filed before the Courts as aggrieved parties (and their lawyers) still prefer to obtain individual and ‘tailored’ redress, rather than joining proceedings controlled by a third party (typically, a representative consumer association).<sup>701</sup> Those actors have also highlighted the need to establish a coherent and genuine collective redress mechanism.<sup>702</sup>

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<sup>699</sup> The number of collective claims has increased over the last few years.

<sup>700</sup> SJM M 53/2016. ECLI:ES:JMM:2016:53.

<sup>701</sup> The preference share cases are a good example as many investors preferred to file an individual claim before a Court or submit the controversy to individual arbitration through consumer arbitration tribunals. In fact, thousands of claims have been settled via ‘*arbitraje de consumo*’, thus avoiding Court proceedings. See also the Study of the Spanish Ombudsman (2013) on the Preference Shares: <https://www.defensordelpueblo.es/wp-content/uploads/2015/05/2013-03-Estudio-sobre-las-Participaciones-Preferentes.pdf>.

<sup>702</sup> See C. Varela García, ‘Hacia un nuevo proceso civil colectivo en el ejercicio de las acciones en defensa de los consumidores y usuarios’, Ponencia de las Jornadas de ADICAE ‘Sin acción colectiva no hay justicia para los consumidores’, 2 October 2014. Available at:

In the aftermath of mass financial related disasters (complex financial products acquired by small investors – for instance, preference share cases-, floor- clauses in mortgage contracts, etc.) there have been some legislative reactions (without express reference to the EC Recommendation), but still based on individual redress mechanisms. In this regard, last January 2017, and as a reaction to the CJEU decision on the ‘floor-clauses’ of 21 December 2016, the Spanish government approved a Royal decree- law in order to establish an out-of-court mechanism aimed at preventing thousands of individual proceedings before the Spanish courts. Interestingly, this out-of-court mechanism is designed for aggrieved parties on a voluntary basis, but considered individually. The Royal Decree- law also stipulates the establishment of a Monitoring Committee, which will be in charge of the monitoring, the control and the assessment of the claims arising from the application of the law. This Committee must issue a biannual report and will involve consumers and lawyers’ representatives. This body will be in charge of collecting relevant information and may propose the measures it considers necessary for the correct implementation of this extrajudicial mechanism.

Furthermore, the General Council of the Judiciary (*Consejo General del Poder Judicial*) has announced an *emergency plan* to face potential massive litigation related to the floor- clauses cases.<sup>703</sup> These measures would include ‘specialized’ First instance courts and therefore, additional human and material resources. The issue is that collective redress mechanisms are not envisaged as a real alternative to individual litigation.

#### **b. Incompatibilities with the Recommendation’s principles**

From a general perspective, Spanish law provides for collective redress mechanisms aimed at providing compensatory and injunctive relief. However, the mechanism is neither coherent nor systematic, since the rules are dispersed throughout different laws.

While the Recommendation advocates for the creation of a claimant party through its opt-in principle as the default option, the EU instrument accepts exceptions under its opt-out principle. The Spanish CCP does not contain any specific rule on the issue and as a consequence, the constitution of the claimant party has been subject to diverging interpretations and this may collide with the ‘any exception to this principle, by law or by court order, should be duly justified by reasons of the sound administration of justice’. Taking into account the rules established in Article 15 CCP (announcement and intervention in proceedings for the protection of collective and diffuse interests of consumers and users), Article 221 CCP (judgments issued in proceedings brought by consumer or user associations, Article 222.3 CCP (material *res judicata*) and Article 519 CCP (enforcement action for consumers and users grounded on a conviction without individual determination of beneficiaries), it has been argued that the Spanish system advocates for an opt- out *sui generis* regime.<sup>704</sup> However, the recent case

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[http://publicaciones.adicae.net/publicaciones/pdf/Ponencia Fiscal Varela 2 octubre 2014 .pdf](http://publicaciones.adicae.net/publicaciones/pdf/Ponencia_Fiscal_Varela_2_octubre_2014.pdf)

<sup>703</sup> Press release available at: <http://www.poderjudicial.es/cgpj/es/Poder-Judicial/En-Portada/Los-Juzgados-especializados-en-clausulas-suelo-tendran-distintos-niveles-de-refuerzo-en-funcion-de-la-entrada-de-asuntos>.

<sup>704</sup> F. Gascón Inchausti, *Tutela judicial de los consumidores y transacciones colectivas*, Ed. Civitas, Madrid, 2010, at 26. A. Montesinos García, ‘Últimas tendencias en la Unión europea sobre las acciones colectivas de consumo. La posible introducción de fórmulas

law of the CJEU and the Spanish Constitutional and Supreme Courts seems to favour the compatibility of individual and collective actions (both referred to the stay of proceedings/ *res judicata* effect) so it may be concluded that collective proceedings are binding for those actively joining the claim, but the existence of the collective proceeding does not impede the exercise of a second (individual) claim. Considering the recent case law and the fundamental procedural rights granted by Article 24 of the Spanish Constitution, together with Article 6 ECHR and Article 47 (1) of the Charter of Fundamental Rights, the Spanish system might be interpreted as an opt-in model.

On remedies, the EC Recommendation advocates injunctive and compensatory relief and both may be achieved under the Spanish system when consumers are involved. In this regard, the CCP was amended in 2014 to grant standing to the Public Prosecution Service to claim for damages (and not only for injunctive relief). However, it is not clear whether compensatory relief for collective losses is recognized in other areas – however, each victim is entitled both to claim damages individually, and to join other claimants through a joint action with several co-plaintiffs.

Information on collective redress actions is available in the terms *generally* prescribed by the Recommendation, as far as, for instance, consumer associations and law firms publicize potential collective claims and the CCP establishes a series of rules in order to identify aggrieved parties. However, Spain does not comply with the requirement to establish a National Registry of collective redress actions and there are no public reform plans to establish it in the near future.

On funding, the Spanish system ignores the third-party funding institution in itself- this is neither regulated nor used in practice.

### **c. Problems relating to access of justice/fairness of proceedings including**

#### **Restrictions on access to justice negatively affecting collective redress**

The interplay between individual and collective actions has been a critical issue at stake. Over the last few years, and due to the lack of a coherent procedural system, the question of whether the existence of a collective action prevented (or not) individuals from obtaining individual redress before a different court (*lis pendens*, stay of proceedings and *res judicata*) fostered legal uncertainty.

#### **Time and burden of collective actions on courts and parties compared to non-collective litigation**

The traditional reluctance to engage in collective litigation in Spain may be related to a cultural fact: individual litigation as a means of obtaining 'tailored' redress is still preferred – a fact that is confirmed by the existence of parallel litigation (collective – individual actions) in recent cases and it seems that members of the judiciary still prefer to face individual actions rather than *real* collective proceedings. The recent experiences have shown that First instance courts dealing with collective claims have been stuck (for months or years),

due to the general lack of human and material resources in the Spanish Administration of Justice (circumstances aggravated by the economic crisis). This might work as an incentive to file an individual claim as well, as the management of the case is less complex.

### **Risks of and examples for abusive litigation**

Over the last few years, the economic crisis along with the occurrence of a series of mass harm situations, such as the scandals related to the sale of complex financial products to small investors or the 'floor-clauses' cases in loan contracts, have undoubtedly influenced the way in which Spanish people injured by the same legal infringement seek relief. Nowadays, collective proceedings are frequently being announced on websites, newspapers, radio, etc., so that individual consumers have the opportunity to join collective proceedings initiated by associations of consumers and users and *specialized* law firms. This propaganda may generate some *unknown* risks, such as abusive litigation (unfounded claims) or the generalization of abusive or unfair contingency fees (see above 5. Lawyers' fees).

### **Effective right to obtain compensation.**

As already described, the Spanish law on collective redress is quite fragmented and chaotic. These procedural issues do not impact negatively on the effective right to obtain redress in mass harm situations, but sometimes the 'effectiveness' of redress might be questioned due to the length of the court procedures.

As already mentioned, the general procedural rules described under section II. 2 apply to non-consumer law scenarios. In addition to this general provisions there are sectoral rules dealing primarily with legal standing issues within different and categorized areas, such as competition law, antidiscrimination law, environmental law and labour law.

## **B. Competition law**

### **1. Scope/ Type**

#### **a. Horizontal/ sectoral**

Leaving aside the application of the general provisions of the CCP, the UCA also provides for a series of actions, which may be taken against acts of unfair competition, including unlawful advertising.<sup>705</sup> These remedies include:

- (1) to have the unfairness of the conduct declared,
- (2) the cessation and prohibition order of subsequent repetition of the unfair behaviour,
- (3) the removal of the effects produced by the unfair behaviour,
- (4) the rectification of a misleading, incorrect or false information, and finally,
- (5) an action against unjust enrichment, which shall only apply when the unfair practice prejudices a legal position protected by an exclusive right or some other of similar content.

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<sup>705</sup> See also Article 6 of the Act 34/1988 on Advertising (Ley 34/1988, de 11 de noviembre, General de Publicidad).

Furthermore, in favourable rulings regarding the actions envisaged in the subsections 1 to 4, it may be determined the total or partial publication of the court decision or a rectifying statement (Article 32 UCA).

### **b. Injunctive / compensatory**

Under the application of the UCA, both injunctive and compensatory relief are available in collective redress cases. However, compensatory relief is only available under certain conditions (see below 2.b. Standing) and the action against unjust enrichment is only available to the holder of the violated legal position (see Article 33 UCA).

Furthermore, any claim arising from a breach of the competition law rules contained in Article 1 and 2 of the Act 15/2007 on the Protection of Competition (APC)<sup>706</sup>, can be brought before the competent Spanish Competition Authority (CNMC– public enforcement) but also before the Courts (private enforcement).

## **2. Procedural Framework**

### **a. Competent Court**

Private law courts (Commercial courts *ex Art. 86 LOPJ*) are the competent courts. Nevertheless, the decisions of the Spanish Competition Authority (CNMC) might be appealed before the Administrative Courts. When the administrative investigation is still ongoing or when the administrative decision is not final, Civil courts are still not bound by the findings of fact made by the CNMC (See below e. Main procedural rules).

### **b. Standing**

As mentioned above, apart from the general rules of the CCP, the UCA establishes a series of rules on standing depending on the type of the claim brought before the Courts. In this regard, Article 33 UCA grants standing to claim compensation for damages to associations of consumers and users, to the entities legally constituted whose purpose is the defence or protection of those consumers and users and to the groups affected. Selected claims (Article 32. 1 numbers 1 to 4 – see above) may be brought by associations, professional corporations or representatives of economic interests when the interests of their members are affected. Furthermore, the same 'selected' claims may be brought in defence of the general, collective or diffuse interests of consumers and users by (1) the National Institute of Consumer affairs and its regional/ local counterparts, (2) consumer and user associations meeting the requirements laid down in the GCA or in the relevant regional legislation, (3) organizations from other EU Member States constituted for the protection of the collective and diffuse interests of consumers and users and authorised by virtue of their inclusion in the list published for that purpose in the Official Journal of the EU. Finally, the Public Prosecution Service may order injunctions in the defence of the general, collective or diffuse interests of consumers and users.

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<sup>706</sup> *Ley 15/2007, de 3 de julio, de Defensa de la Competencia*. Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFUE) are also directly enforceable before the Courts.

**c. Availability of Cross Border collective redress**

See above.

**d. Opt In/ Opt Out**

See above Section II.2.

**e. Main procedural rules**

**Evidence/discovery rules**

In this context, follow-on claims may come to reduce the burden of proof or to exempt the claimant to prove the unlawful practice, as there is a previous administrative decision containing relevant data about the unlawful behaviour.<sup>707</sup> When the administrative decision is challenged before the Administrative Courts and this Court issues a ruling ratifying the facts, Civil courts are bound by the finding of facts made by the Administrative court.

In stand-alone actions, the court would need to confirm the alleged breach of competition law before concluding that the infringement has caused damages.

Interim measures can be granted by the Courts upon request of the interested parties (and by the CNMC *ex officio*). See above.

See above Section II.2. for further details.

**3. Available Remedies**

**a. Type of damages**

As described above, injunctive and compensatory relief are available in cases of breaches of competition law.

**b. Skimming-off/ restitution of profits**

According to the wording of Article 33.1 UCA, the action against unjust enrichment shall only be filed by the holder of the violated legal position.

**c. Injunctions**

Injunctions are available in collective actions following Article 32 UCA (see above for further details)

**d. Possibility to seek an injunction and compensation within one single action**

Compensatory and injunctive relief may be granted under the same claim.

**e. Limitation periods**

General limitation periods apply. The Spanish Supreme Court (Civil chamber) in its decision of 8 June 2012<sup>708</sup> has established that antitrust damage claims have a non-contractual nature when resulting from an infringement of a cartel prohibition and that the limitation period of 1 year (Article 1968 CC) begins

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<sup>707</sup> Generally, follow-on actions have been rarely filed before Spanish courts. See E. Ruiz de Angulo Gómez/ R. Bayo Álvarez/ J. Costas Comesaña, 'National examples of private enforcement of Competition Law: Spain' in *Private Enforcement of Competition law*, Ed. Lex Nova, Valladolid, 2011 at 138 ff.

<sup>708</sup> STS 5462/2012. ECLI:ES:TS:2012:5462.

after the binding decision confirming the infringement – that is, the final decision of the Supreme Court upholding the administrative prohibition decision). Furthermore, Article 35 UCA sets out that 'actions against unfair competition laid down in Article 32 UCA lapse one year after the person entitled to take action discovered who was responsible for the act of unfair competition and, in any case, three years as from the time such conduct ceased. The time bar for legal action in defence of general, collective or diffuse interests of consumers and users is governed by the terms of Article 56 GCA' (see above).

For further details see above Section II.2.

#### **4. Costs**

See above Section II.2.

#### **5. Lawyers' Fees**

See above Section II.2.

#### **6. Funding**

See above Section II.2.

#### **7. Enforcement of collective actions/settlements**

See above Section II.2.

#### **8. Number and types of cases brought/pending**

There are very few cases involving collective redress in the competition law sphere:

(1) At the end of 2007 a collective redress action was filed by *Ausbanc* ('*Asociación de Usuarios de Servicios Bancarios*') against *Telefónica* before the Commercial Court No. 4 of Madrid, based upon the Decision of the European Commission of 4 July 2007 that established that *Telefónica* had abused its dominant position within the ADSL market. However, the Commercial court ruled in October 2012 that *Ausbanc* was not entitled to represent the consumers and users in that matter (lack of legal standing).

(2) There have been two follow-on actions after the 1999 DCT's<sup>709</sup> decision on the sugar production cartel: the decisions of the Supreme Court (Civil Chamber) of 8 June 2012 and of 7 November 2013.<sup>710</sup> In both cases the Supreme Court granted compensation to companies damaged by the sugar cartel (joined actions).

(3) On July 2015, *OCU* ('*Organización de consumidores y usuarios*') announced its intention to bring a collective damage claim representing

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<sup>709</sup> This is the former *Tribunal de Defensa de la Competencia*.

<sup>710</sup> STS 5819/2013. ECLI:ES:TS:2013:5819.

consumers against the different car dealers of different car brands having being fined by different CNMC's decisions.<sup>711</sup>

## **9. Impact of the Recommendation/Problems and Critiques, including**

### **a. Impact of the collective mechanism (or lack of) on behaviour/policy of stakeholders (direct/ indirect, economic/social impact)**

See above Section II.2.

### **b. Incompatibilities with the Recommendation's principles**

See above Section II.2.

### **c. Problems relating to access of justice/fairness of proceedings including**

- Restrictions on access to justice negatively affecting collective redress. The 'Sugar cartel case' provides evidence on the (sometimes) lengthy procedures related to follow-on actions. The decision of the National Authority was adopted in 1999, challenged before the Administrative courts, and then, finally the Decisions of the Supreme Court granting compensation to companies are dated in 2012 and 2013.
- Time and burden of collective actions on courts and parties compared to non-collective litigation. See previous paragraph.
- For further details see above Section II.2.

## **C. Other sectoral laws**

### **1. Antidiscrimination law**

In 2007 the CCP was amended to insert a new Article 11*bis* (Standing for the defence of the right of equal treatment for men and women). According to this provision trade unions and other legally constituted associations whose primary goal is the defence of equal treatment for men and women, shall be authorised to represent their own affiliates and members. Furthermore, when those affected are an indeterminate number of persons or a number difficult to ascertain, the standing to lodge a claim in court in defence of these diffuse interests corresponds exclusively to the public bodies with competence in the matter, to the more representative trade unions and to the associations at State level whose primary objective is equality between men and women, 'notwithstanding their procedural standing if those affected are determined'. Paragraph 3 of Article 11 CCP establishes that in cases of sexual or gender harassment, the person harassed is the only person who can bring a claim before the courts.

Furthermore, Article 76 of the Revised Text of the Act 1/2013 on Equal Opportunities and Social Inclusion<sup>712</sup> also grants standing to legal entities,

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<sup>711</sup> <https://www.ocu.org/organizacion/prensa/notas-de-prensa/2016/demanda-concesionarios> and <https://www.cnmec.es/2015-06-05-la-cnmec-multa-con-411-millones-de-euros-95-concesionarios-de-automoviles-audi-volkswagen>.

<sup>712</sup> Real Decreto Legislativo 1/2013, de 29 de noviembre, por el que se aprueba el Texto Refundido de la Ley General de derechos de las personas con discapacidad y de su inclusión social.



under certain criterion, to defend collective interests and rights in order to ensure the effectiveness of the right to equal opportunities.

## **2. Environmental law**

Article 42 of the Act 26/2007 on Environmental liability <sup>713</sup> contains mainly administrative provisions, but according to Arts 41 and 42 collective, physical and legal persons (under certain circumstances) can initiate proceedings (as interested parties) in environmental damage cases.

## **3. Labour law**

Trade unions, under certain circumstances, have standing to promote the defence of workers' collective interests. In this regard, under Articles 153-162 of the Act 36/2011 on Social Jurisdiction Proceedings<sup>714</sup>, the 'collective conflicts' proceedings are designed.

# **III. Information on Collective Redress**

## **1. National Registry**

Spanish law does not provide for a National Registry on collective redress actions.

## **2. Channels for dissemination of information on collective claims**

Article 15 CCP contains provisions governing the publication of the proceedings in order to make the intervention of the affected persons in the collective proceedings possible. Leaving aside the CCP, there are no other pre-established channels for dissemination of information on collective claims. However, over the last few years, law firms and consumer and users' associations have been playing a crucial role in disseminating information on collective redress claims. In this regard, collective proceedings are frequently being publicized through the media (websites, newspapers, radio, etc.) so that individual consumers have the opportunity to join collective claims, which are initiated, by both associations and law firms. As already stated, this new form of propaganda may increase some avoidable risks, such as abusive litigation or the generalization of 'unfair/ abusive' *quota litis* arrangements. However, the CCP rules and the guidance rules on fees published by regional bars may act like a barrier.

Finally, it should be noted that after the abovementioned cases on the sale of complex financial products to consumers/ small investors or more recently, on the 'floor- clauses' cases in mortgage contracts, many law firms (irrespectively of their size) have started to publicize collective actions in the media.

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<sup>713</sup> Ley 26/2007, de 23 de octubre, de Responsabilidad Medioambiental.

<sup>714</sup> Ley 36/2011, de 10 de octubre, reguladora de la Jurisdicción Social.

## IV. Case summaries

Key cases for the period 2013- May 2017

<p><b>Case name</b> N/A</p> <p><b>Reference</b> STS 3334/2013 (18 June) ECLI:ES:TS:2013:3334</p> <p><b>Subject area</b> Product liability</p>	<p><b>Keywords</b> Product liability; defective drug; patrimonial and moral damages</p> <p><b>Summary of claims</b> Sixty-eight women filed a claim against the laboratory Sanofi- Aventis, SA. They asked for the compensation of material and moral damages caused by the consumption of <i>Agreal</i> (a drug to treat the symptoms of menopause)</p> <p><b>Findings</b> <i>Agreal</i> was a drug commercialized between 1983 and 2005 aimed at combating the symptoms of menopause. The lab failed to provide complete information on the side effects caused by its consumption, causing harm to women who had taken the pills.</p> <p><b>Outcomes</b> The First instance Court granted compensation for damages to eleven women. Twenty-two of the initial plaintiffs appealed before the Provincial Court but only nine of them were granted compensation for the harm suffered by the consumption of the drug. The Supreme Court confirmed the Provincial Court decision by dismissing the appeal on cassation.</p> <p><i>On the same topic, see also the Supreme Court decision of 10 July 2014 (ECLI:ES:TS:2014:3433). In this case 146 women harmed by the consumption of Agreal were granted 3,000 EUR (moral damage) and 13 of them were compensated for the physical damage caused by the drug.</i></p> <p>Settlement: no</p> <p>Remedy: damages</p> <p>Amount of damages awarded: the final amount of damages awarded and the identification of the successful plaintiffs are not included in the Supreme Court decision.</p>
<p><b>Dispute resolution method</b> Joinder of claims</p> <p><b>Court or tribunal</b> Supreme Court (Civil Chamber, Section 1)</p>	
<p><b>Cross-border character/ implications, if any</b> N/A</p>	
<p><b>Opt-in/out</b> N/A</p>	
<p><b>Type of funding</b> None</p>	
<p><b>Costs</b> Loser pays principle</p>	
<p><b>Abusive litigation</b> No</p>	

	Distribution of damages: N/A
<b>Case name</b> N/A <b>Reference</b> STS 1916/2013 (9 May) ECLI:ES:TS:2013:1916 <b>Subject area</b> Consumer law	<b>Keywords</b> Consumer law; floor- clauses; injunctive relief; nullity of clauses; restitution of unduly paid sums. <b>Summary of claims</b> AUSBANC (consumer association) filed a claim against financial entities in order to declare abusive the so-called floor-clauses inserted in mortgage loan contracts. Furthermore, a cease action to avoid the future use of such unfair terms, the publication of the judgment and its access to the Registry of general terms were also requested by the plaintiff.
<b>Dispute resolution method</b> Collective/ Representative action <b>Court or tribunal</b> Supreme Court (Civil Chamber)	<b>Findings</b> 'Floor- clauses' were inserted in mortgage loan agreements concluded between financial institutions and consumers. The clauses in question provided that, even if the interest rate falls below a certain threshold or floor defined in the agreement, the consumer must continue to pay minimum interest equivalent to that threshold or floor, without being able to benefit from a lower interest rate.
<b>Cross-border character/ implications, if any</b> N/A	<b>Outcomes</b> The Supreme Court declared null and void those abusive floor- clauses inserted as general terms in mortgage loan contracts. However, the Supreme Court surprisingly declared that the invalidity of the unfair term did not imply retroactive effects (that is, the consumers were not entitled to claim the restitution of the amounts unduly paid in light of such nullity). <i>It should be noted that this interpretation has been overruled by the CJEU as the European Court has ruled that the Spanish case-law placing a temporal limitation on the effects on the invalidity of 'floor clauses' included in mortgage loan contracts is incompatible with EU law. Recent decisions of the Supreme Court have confirmed the retroactive effects and the right to obtain restitution of these unduly paid amounts (however, these are individual actions. See for instance the Supreme Court decision</i>
<b>Opt-in/out</b> N/A	
<b>Type of funding</b> N/A	
<b>Costs</b> No order for costs	
<b>Abusive litigation</b> N/A	

	<p>(Civil Chamber) of 24 February 2017</p> <p>Settlement: N/A</p> <p>Remedy: injunctive relief + limited restitution of unduly paid sums.</p> <p>Amount of damages awarded: N/A</p> <p>Distribution of damages: N/A</p>
<p><b>Case name</b></p> <p>N/A (However, this is known as the Sugar cartel decision)</p> <p><b>Reference</b></p> <p>STS 5819/2013 (7 November)</p> <p>ECLI:ES:TS:2013:5819</p> <p><b>Subject area</b></p> <p>Competition law</p>	<p><b>Keywords</b></p> <p>Competition law; sugar cartel; damages to competitors; follow-on action</p> <p><b>Summary of claims</b></p> <p>Claim for damages against a sugar manufacturer which had been previously sanctioned by the competent Competition Authority (<i>Nestlé, Lacasa, Zahor and others vs Ebro foods</i>).</p>
<p><b>Dispute resolution method</b></p> <p>Joint action (several co-plaintiffs)</p> <p><b>Court or tribunal</b></p> <p>Supreme Court (Civil Chamber, Section 1)</p>	<p><b>Findings</b></p> <p>The price-fixing sugar cartel was dismantled and fined by the Spanish Competition Authority in 1999. Two follow-on claims were brought before the Courts after the final administrative decision. The first Supreme Court decision was in 2012 and this was the second case heard before the Civil Courts.</p>
<p><b>Cross-border character/ implications, if any</b></p> <p>N/A</p>	<p><b>Outcomes</b></p> <p>The Supreme Court established that the right to effective judicial protection to be compensated must be granted to any victim of anticompetitive behaviour.</p>
<p><b>Opt-in/out</b></p> <p>N/A</p>	<p>Settlement: N/A</p>
<p><b>Type of funding</b></p> <p>N/A</p>	<p>Remedy: damages</p>
<p><b>Costs</b></p> <p>Loser pays (first instance and appeal costs)</p>	<p>Amount of damages awarded: in total: 4,1 million EUR</p>
<p><b>Abusive litigation</b></p> <p>N/A</p>	<p>Distribution of damages: each plaintiff asked for an amount of damages in order to be compensated for their economic losses.</p> <ul style="list-style-type: none"> <li>- Nestlé España, SA: 1,548.828.39 EUR</li> <li>- Productos del Café, SA: 19.881,94 EUR</li> <li>- Helados y Postres: 149.207,66 EUR</li> <li>- Chocolates Hosta Dulcinea, SA:</li> </ul>

	<p>774.957,00 EUR</p> <ul style="list-style-type: none"> <li>- Zahor, SA: 3.802, 59 EUR</li> <li>- Mazapanes Donaire, SL: 27.428,10 EUR</li> <li>- LU Biscuits, SA: 191.674,35 EUR</li> <li>- Chocolates Torras, SA: 18.608,72 EUR</li> <li>- Arluy, SL: 45.089, 76 EUR</li> <li>- Chocovic, SA: 448.188,58 EUR</li> <li>- Lacasa, SAU: 76.109,09 EUR</li> <li>- Productos Mauri, SA: 8.305,27</li> <li>- Delaviuda Alimentación, SA: 90.177,17 EUR</li> <li>- Wringley CO, SA: 702.950.17 EUR</li> </ul>
<p><b>Case name</b></p> <p>N/A</p> <p><b>Reference</b></p> <p>STS 1279/2015 (24 March)</p> <p>ECLI:ES:TS:2015:1279</p> <p><b>Subject area</b></p> <p>Consumer law</p>	<p><b>Keywords</b></p> <p>Consumer law; unfair terms; injunctive relief</p> <p><b>Summary of claims</b></p> <p>AUSBANC (consumer association) filed an injunction against a financial entity asking for the annulment of a (potential) unfair term included in banking contracts (floor clause) together with a cease action to avoid the future use of such unfair term. The plaintiff also requested the publication of the judgement and its access to the Registry of general terms.</p> <p><b>Findings</b></p> <p>BBK Bank Cajasur SA inserted floor and ceiling clauses as general terms in loan contracts. In order to protect the consumer interests, AUSBANC filed a claim aiming at combating the use of such terms (the floor clauses).</p>
<p><b>Dispute resolution method</b></p> <p>Collective/ Representative action (Consumer association). However, the plea of lack of legal standing was admitted by the first instance Court so the Public Prosecution Service continued the proceedings.</p> <p><b>Court or tribunal</b></p> <p>Supreme Court (Civil Chamber)</p>	<p><b>Outcomes</b></p> <p>The Supreme Court dismissed the appeal in cassation and confirms the decision of the Provincial Court, favourable to the petition of the claimant party. The clause was declare therefore null and void (see above Summary of claims).</p> <p>Settlement: no/N/A</p> <p>Remedy: injunction</p>
<p><b>Cross-border character/ implications, if any</b></p> <p>N/A</p>	
<p><b>Opt-in/out</b></p> <p>N/A</p>	
<p><b>Type of funding</b></p> <p>None. N/A</p>	
<p><b>Costs</b></p>	

Loser pays principle	Amount of damages awarded: N/A
<b>Abusive litigation</b> N/A	Distribution of damages: N/A
<b>Case name</b> N/A	<p><b>Keywords</b></p> <p>General contractual terms; banking contracts; unfair terms; control of transparency and abusive clauses; representative action</p> <p><b>Summary of claims</b></p> <p>OCU ('Organización de consumidores y usuarios') filed a representative claim against two financial entities (Banco Popular Español, SA and BBVA, SA) mainly asking for the annulment of several (potential) unfair terms included in banking contracts together with a cease action to avoid the future use of such unfair terms. The plaintiff also requested the publication of the judgement and its access to the Registry of general terms.</p> <p><b>Findings</b></p> <p>Two financial entities (Banco Popular Español, SA and BBVA, SA) inserted (potential) unfair terms in some banking contracts (for instance, floor clauses, mortgages fees and costs, etc.). In order to protect the consumer and users interests, OCU filed a claim aiming at combating the use of such terms.</p> <p><b>Outcomes</b></p> <p>The Supreme Court dismisses the appeal in cassation (the Provincial Court admitted the claim against the financial entities). Clauses were declared null and void (i.e., were considered unfair terms).</p> <p><i>Following this decision, ADICAE (another consumer association) has announced its intention to promote a collective settlement involving financial entities, claiming on behalf of their members (individual consumers) the recovery of unduly paid mortgage costs (such as notary costs, mortgage land registry costs, attached abusive insurance costs, etc.</i></p> <p>Settlement: N/A</p>
<b>Reference</b> STS 5618/2015 (23 December) ECLI:ES:TS:2015:5618	
<b>Subject area</b> Consumer law	
<b>Dispute resolution method</b> Collective/ Representative action	
<b>Court or tribunal</b> Supreme Court (Civil Chamber)	
<b>Cross-border character/ implications, if any</b> N/A	
<b>Opt-in/out</b> N/A	
<b>Type of funding</b> N/A none	
<b>Costs</b> Loser pays rules	
<b>Abusive litigation</b> No/N/A	

	<p>Remedy: injunction</p> <p>Amount of damages awarded: N/A. <i>However, following this decision, individual claimants are reaching private agreements with these financial institutions in order to recover unduly paid sums.</i></p> <p>Distribution of damages: N/A</p>
<p><b>Case name</b></p> <p>N/A (AVITE case)</p> <p><b>Reference</b></p> <p>STS 4149/2015 (20 October)</p> <p>ECLI:ES:TS:2015:4149</p> <p><b>Subject area</b></p> <p>Product liability</p>	<p><b>Keywords</b></p> <p>Product liability; defective product; damages; representative action</p> <p><b>Summary of claims</b></p> <p>AVITE filed a claim against Grünenthal Pharma (German pharmaceutical company) asking for damages caused by the consumption of thalidomide (20.000 EUR for every percentage point of disability in each case of the 186 victims).</p>
<p><b>Dispute resolution method</b></p> <p>Collective/ Representative action</p> <p><b>Court or tribunal</b></p> <p>Supreme Court (Civil Chamber)</p>	<p><b>Findings</b></p> <p>In 2012, AVITE (the Spanish association of Thalidomide victims) filed a claim asking for 204 million EUR in damages. After the decisions of the First instance court and the Provincial Court of Madrid, the Supreme Court upheld the overturning of the previous decision on the basis that the statute of limitations on the case has run out.</p>
<p><b>Cross-border character/ implications, if any</b></p> <p>N/A</p>	<p>Settlement: no</p>
<p><b>Opt-in/out</b></p> <p>N/A</p>	<p>Remedy: compensation (not awarded)</p>
<p><b>Type of funding</b></p> <p>None /N/A</p>	<p>Amount of damages awarded: none</p>
<p><b>Costs</b></p> <p>Loser pays principle</p>	<p>Distribution of damages: N/A</p>
<p><b>Abusive litigation</b></p> <p>No</p>	
<p><b>Case name</b></p> <p>N/A</p> <p><b>Reference</b></p> <p>SJM M 53/2016 (7 April)</p> <p>ECLI:ES:JMM:2016:53</p> <p><b>Subject area</b></p> <p>Consumer law</p>	<p><b>Keywords</b></p> <p>Consumer law; floor clauses in loan agreements; unfair terms; representative action</p> <p><b>Summary of claims</b></p> <p>ADICAE filed a claim on behalf of more than 15,000 consumers against 72 financial institutions. Essentially, the association asked for injunctive relief (to prevent the future use of floor clauses in</p>
<p><b>Dispute resolution method</b></p>	

<p>Collective/ Representative action</p> <p><b>Court or tribunal</b></p> <p>Commercial Court of Madrid, Section 11</p>	<p>loan contracts), compensatory collective relief (asking for the restitution of unduly paid amounts) and a declaratory action of nullity.</p>
<p><b>Cross-border character/ implications, if any</b></p> <p>N/A</p>	<p><b>Findings</b></p> <p>'Floor- clauses' were inserted in mortgage loan agreements concluded between financial institutions and individual consumers. The clauses in question provided that, even if the interest rate falls below a certain threshold or floor defined in the agreement, the consumer must continue to pay minimum interest equivalent to that threshold or floor, without being able to benefit from a lower interest rate.</p>
<p><b>Opt-in/out</b></p> <p>N/A</p>	
<p><b>Type of funding</b></p> <p>None (N/A)</p>	
<p><b>Costs</b></p> <p>No order for costs</p>	<p><b>Outcomes</b></p>
<p><b>Abusive litigation</b></p> <p>No</p>	<p>The Commercial Court decision declares null and void certain floor clauses inserted in mortgage loan contracts and prohibits its future incorporation into other contracts. Furthermore, financial institutions must reimburse consumers the unduly paid amounts – but with limited effects, that is, since 9 May 2013.</p> <p>Settlement: no</p> <p>Remedy: injunction and damages</p> <p>Amount of damages awarded: restitution of unduly paid amounts</p> <p>Distribution of damages: N/A</p>
<p><b>Case name</b></p> <p>N/A</p> <p><b>Reference</b></p> <p>SJM M 12/2017 (16 February)</p> <p>ECLI:ES:JMM:2017:12</p> <p><b>Subject area</b></p> <p>Consumer law</p>	<p><b>Keywords</b></p> <p>Consumer law; representative claim; damages suffered by small investors (non- professional investors).</p> <p><b>Summary of claims</b></p> <p>ADICAE filed two injunctions (to cease in the commercialization of a financial product and to stop misleading advertising) and a declaratory action of nullity of the sale contracts (unfair terms) against BANKIA on the grounds of the massive sale of complex financial products to small investors (preference shares). Restitution of amounts and compensation for damages are also included in the claim.</p>
<p><b>Dispute resolution method</b></p> <p>Collective/ Representative action</p> <p><b>Court or tribunal</b></p> <p>Commercial Court of Madrid, Section 5</p>	
<p><b>Cross-border character/</b></p>	



<b>implications, if any</b> N/A	<b>Findings</b> Caja Madrid (now BANKIA) sold preference shares to small investors who were completely unaware of the complexity of those financial products. Following the financial crisis, thousands of clients suffered significant losses. ADICAE filed a representative claim on behalf of their members.  <b>Outcomes</b> The Commercial Court admitted partially the claims (declared null and void certain terms and granted injunctive relief – however limited the res judicata effect to the members of ADICAE who had joined the proceedings). However, the court rejected the collective claim asking for the annulment of the contracts based on the lack of informed consent (mistake). The judge considers that consent can only be analysed on an individual basis and not collectively.  Settlement: no Remedy: injunction Amount of damages awarded: no Distribution of damages: N/A  <i>Please note that this is a first instance decision.</i>
<b>Opt-in/out</b> N/A	
<b>Type of funding</b> None	
<b>Costs</b> No order for costs (each party shall bear its own costs, and all common costs shall be shared between the parties in equal parts)	
<b>Abusive litigation</b> N/A	
<b>Case name</b> N/A  <b>Reference</b> STS 454/2017 ECLI:ES:TS:2017:454  <b>Subject area</b> Product liability/ consumer law	<b>Keywords</b> Product liability; consumer law; breast implants; contract law; damages  <b>Summary of claims</b> A Consumer association filed a claim on behalf of 53 women (their members) against a clinic asking for the annulment of the contract for services (based on mistake) and the corresponding damages caused by the defective breast implants.  <b>Findings</b> ‘Asociación de consumidores y usuarios de las Islas Baleares’ (Acuib) filed a claim on behalf on their 53 members against a clinic. They had carried PIP breast implants, which were implanted in the premises of that clinic.
<b>Dispute resolution method</b> Group action/ representative action  <b>Court or tribunal</b> <b>Supreme Court (Civil Chamber)</b>	
<b>Cross-border character/ implications, if any</b>	

<b>N/A</b>	<b>Outcomes</b>  The Supreme Court dismisses the appeal. The contracts were not declared null and void as the court considers that those women were properly informed about the risks of carrying breast implants, i.e., there was not medical malpractice in these cases.
<b>Opt-in/out</b>	
<b>N/A</b>	
<b>Type of funding</b> Non	
<b>Costs</b> Loser pays principle	
<b>Abusive litigation</b> No	<b>Keywords</b>  Consumer protection; floor clauses; individual action; collective action; <i>res judicata</i> effect; retroactive effects  <b>Summary of claims</b>  A consumer filed a claim against a financial entity asking for the annulment of a floor-clause (abusive clause) and the restitution of the amounts unduly paid.  <b>Findings</b>  A floor- clause was inserted in a mortgage loan agreement concluded between a consumer and a bank. The client filed a claim asking for the annulment of such abusive clause and the restitution of the amounts unduly paid.  <b>Outcomes</b>  This decision has adapted the Supreme Court doctrine to the CJEU of 21 of December 2016. The relevant outcome of this decision is that the Court sustained that a joint interpretation of Articles 15, 222.2 and 221 CCP leads to the conclusion that, when a collective action is filed (see Decision of the Supreme Court of 9 May 2013), the <i>res judicata</i> effect of the corresponding judgment upholding the claim only affects to those absent consumers who are individually determined in the text of the judgment ex Article 221.1.1 CCP.  <i>See also the Supreme Court decision of 9 March 2017 and the Auto of the Supreme Court of 19 April 2017 (mentioned above in this report).</i>
<b>Case name</b>	
<b>N/A</b>	
<b>Reference</b> STS 477/2017 (24 February)	
<b>Subject area</b> Consumer law	
<b>Dispute resolution method</b> Individual action	
<b>Court or tribunal</b> Supreme Court (Civil Chamber)	
<b>Cross-border character/ implications, if any</b> N/A	
<b>Opt-in/out</b> N/A	
<b>Type of funding</b> None (N/A)	
<b>Costs</b> No order for costs	
<b>Abusive litigation</b> No	



# SWEDEN – FACTSHEET

## **Scope**

General mechanism under the Group Proceedings Act

There is a specific collective ADR mechanism in consumer cases.

Both compensatory and injunctive relief is available.

## **Standing** (Para. 4-7)

### **General**

Representative claimants can be:

- Government organisations
- Individual members of a group affected
- non-profit making organisations representing groups concerned.

### **Consumer**

Consumer Ombudsman or a group of individuals if the ombudsman has declined to act.

## **Admissibility** (Para. 8-9)

No early determination of admissibility questions, admissibility decided under the ordinary procedural rules.

## **Information on Collective Redress** (Para. 10-12, 35-37)

The court has a wide discretion as to how to order the dissemination of information and may order one of the parties to take certain steps. Any extra costs incurred by a party will be met from public funds

### **Problems/Incompatibilities with Recommendation principles**

Too few cases for a national registry.

## **Funding** (Para. 14-16)

In most cases the representative claimant is expected to receive some financial support from outside sources, including third parties and public funds.

### **Problems/Incompatibilities with Recommendation principles**

There is no specific regulation of third party funding. The court will consider the adequacy of the representative's funding at the admissibility stage.

## **Cross Border Cases** (Para. 17-18)

There are no specific rules or limitations as to the participation of foreign claimants.

## **Expedient procedures for injunctive orders** (Para. 19)

### **General**

The court may grant an injunction on an interim basis in order to safeguard the claimant's rights.

### **Consumer**

Under the consumer law regime the Consumer Ombudsman may issue a prohibition order.

The average duration of a complaint to the National Board of Consumer Disputes is 85 days

## **Competition Law**

The Swedish Competition Authority has the power to issue prohibition orders.

### **Efficient enforcement of injunctive orders** (Para. 20)

There is currently no group enforcement procedure and enforcement is carried out by the individual claimants under standard enforcement rules.

The court can impose fines on a noncompliant party.

### **Opt In/Opt Out** (Para. 21-24)

#### **General**

Opt-in only.

The claimant must identify the group members in their original application. The members will then receive a notification and have a window specified by the court to indicate whether they wish to participate. Those who do not reply are deemed to have withdrawn.

#### **Consumer**

Opt-out only

### **Problems/Incompatibilities with Recommendation principles**

The procedure does not enable potential group members to opt in up until judgment.

### **Collective ADR and Settlements** (Para. 25-28)

No specific rules in collective redress cases.

There is the possibility for a court directed settlement or an out of court settlement following ordinary procedural rules

### **Costs** (Para. 13)

#### **General**

The loser pays principle applies.

Group members are not, in principle, liable for litigation costs where the losing defendant is unable to pay.

#### **Consumer**

No costs forum

### **Lawyers' Fees** (Para. 29-30)

Contingency fees are in principle allowed. Claimants and lawyers may enter into a risk agreement under which the lawyer receives more compensation if successful. Such agreements are subject to the approval of the court.

### **Prohibition of punitive damages** (Para. 31)

Punitive damages are not available.

### **Collective Follow- on actions** (Para 33-34)

It is possible to bring a collective follow-on proceeding. However, these are very uncommon.

### **Interplay between injunctions and compensation across all sectors**

It is possible to obtain both an injunction and damages in the same action.

# SWEDEN – REPORT

## I. General Collective Redress Mechanism

### 1. Scope

The Class Action Act, the so called Group Proceedings Act (2002:599) (“GRL”), provides the possibility of binding together a plurality of claims against the same defendant into one group action, which are based on the same or similar circumstances (commonality) and when the claims cannot be equally well pursued through other procedural forms (superiority).

The possibility of group actions covers civil cases, which belong to the competence of the general courts as well as cases concerning environmental damages in environmental courts<sup>715</sup> and cases concerning competition damages in the Patent- and Market Court.

### 2. Procedural Framework

#### a. Competent court

Selected ordinary district courts designated by the Government are competent to try cases under the GRL and there is at least one such designated court in each county<sup>716</sup>. The Government has decided to designate those district courts that are competent to hear real estate disputes. The reason for those particular courts being selected to handle group actions is that they often have considerable resources and experience of handling complex and complicated disputes with many persons involved. They are also geographically spread across the country<sup>717</sup>.

#### b. Standing

Class actions in Sweden can be one of three types: individual group actions, governmental (public) class actions, and suits by organizations<sup>718</sup>. An individual, who is a member in the group concerned, can bring a claim against a defendant in an individual group action. Both natural and legal persons can pursue the individual group action<sup>719</sup>. In suits brought by organizations, the plaintiff must be a non-profit-making-association representing consumers or employees<sup>720</sup>. In environmental cases, non-profit associations can bring class actions if they work for the interests of nature- or environmental conservation. In addition, the associations for fishermen, farmers, reindeer management and forest societies can bring the organizational suit on environmental issues<sup>721</sup>.

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<sup>715</sup> Class Action Act, Section 2 and Code of Environmental matters, Chapter 32, Section 13.

<sup>716</sup> Class Action Act, Section 3.

<sup>717</sup> Per Henrik Lindblom, *Grupptalan i Sverige. Bakgrund och kommentarer till lagen om grupprättegång*, Iustus 2008, p. 300.

<sup>718</sup> Class Action Act, Sections 1, 4, 5 and 6.

<sup>719</sup> Class Action Act, Section 4.

<sup>720</sup> Class Action Act, Section 5.

<sup>721</sup> Code of Environmental matters, Chapter 32, Sections 13 and 14.

The public class action is possible in the cases where a suit has not been brought under an individual class action or by the organization named above<sup>722</sup>. The authorities, with the power to bring a public class action, are the consumer ombudsman and conservation authorities in environmental cases<sup>723</sup>.

**c. Availability of Cross Border collective redress**

There is no specific regulation on international class actions. Normal rules, which cover international procedural law and private international law apply. The same forum must be competent to determine the case with all plaintiffs.

**d. Opt-in; opt-out procedure**

The Swedish system is based on the opt-in – method<sup>724</sup>. The conditions of the opt-in method are prescribed by law. Once the lawsuit is initiated, members of the group must affirmatively opt-in via a communication to the judge if they wish to be part of the action, otherwise they will be excluded. Group members are not parties to the action and customarily do not appear at the trial. However, they may intervene in the proceedings and appeal the judgment, in which case they are treated as parties. The ruling takes legal force both for and against all who have opted-in as if they had claimed personally.

The claimant shall identify the group members by their names and addresses in his/her application. Exceptionally this is not needed at the application level if the group is otherwise identifiable enough. There is no specific measure related to the fact that affected persons are not identifiable but the risk will be that the group does not fulfil the necessary prerequisites. As soon as the group proceedings have been instituted, the group members will get notifications. According to the Section 14 (Group Proceedings Act) a member of the group who does not give notice to the court in writing, within the period determined by the court that he or she wishes to be included in the group action shall be deemed to have withdrawn from the group.

**e. Main procedural rules**

**Certification criteria**

According to Section 8 of the GRL, a group action may only be considered if:

1. the action is founded on claims that are common or of a similar factual nature;
2. group proceedings are not inappropriate owing to the grounds of claims differing substantially from one another;
3. the majority of the claims to which the action relates cannot be equally well pursued by individual actions brought by the members of the group;
4. the group, taking into consideration its size and ambit, is otherwise appropriately defined, and;
5. taking into consideration the plaintiff's interest in the substantive matter, the plaintiff's financial capacity to bring a group action and the

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<sup>722</sup> Government bill 2001/02:107, p. 54.

<sup>723</sup> Class Action Act, Section 6.

<sup>724</sup> Class Action Act, Section 14.

circumstances generally, is appropriate to represent the members of the group in the case.

### **Single or Multi stage process**

There is no multi-stage process but the court decides according to normal procedural rules if the class action is admissible or not.

### **Case-management and deadlines**

A group proceeding can be initiated by a plaintiff of a group of members. It is only the group representative who is the plaintiff and therefore the party to the proceedings. This representative is also the case-manager.

There are no specific deadlines in the Group Proceedings Act but the normal deadlines in the Code of Judicial Procedure (CJP) are used. The court will fix the timetable for the case and the rules on the preclusion are applicable.

### **Evidence/ discovery**

According to the Chapter 35, Section 6 of the Swedish Code of Judicial Procedure, the presentation of evidence is the responsibility of the parties. If necessary, the court may also arrange for the presentation of evidence on its own motion. In cases amenable to out of court settlement or in criminal cases concerning offences not within the domain of public prosecution, however, the court may neither hear a witness unless a party requests that the witness be heard or the witness was previously heard on request of a party, nor, except on request of a party, direct the production of documentary evidence. Therefore, in most cases the initiative of parties is needed in order to obtain evidence.

In Sweden, the concept of full discovery is as yet unknown. A party is, however, under the duty to state what evidence they rely upon. Discovery may also be ordered against any holder of a document which may be presumed to have evidentiary value. The difficulty is, however, that to obtain a court order the applicant will have to identify the document with such clarity that, if need be, the order can be enforced by a bailiff.

One of way in which the problems with discovery may be overcome is for the requesting party to ask the court for permission during the pre-trial hearing to call witnesses who may be privy to the existence and the contents of relevant documents. This approach has gained increasing popularity in recent years and it tends to make the documentary discovery rules more efficient<sup>725</sup>.

The parties are free to put questions to each other during the pre-trial proceedings and in the main hearing. However, there is no general sanction available to force an answer.

### **Interim measures**

The Court may order appropriate measures to safeguard an applicant's rights under Chapter 15, Section 3 of the Code of Civil Procedure. For example, by a making prohibitory injunction ordering the defendant not to work on certain goods listed in a competition clause. Under certain conditions such an order may be made on an interim basis by the Court.

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<sup>725</sup> Chapter 42, Section 8, Paragraph 1 in the Code of Judicial Procedure and Lundblad 1990, pp. 151 - 152.



### **Court directed settlement option: during procedure**

Settlement may occur during the proceedings. There are no specific rules as to how the settlement discussions are to be conducted. Settlement activities vary from court to court and from judge to judge.

In addition to "normal settlement negotiations", the court may appoint special mediators. Such a decision requires the parties' consent of right. The court shall order the parties to attend a meeting before a mediator appointed by the court, the court shall further specify in the order the period within which the mediation is to be finalized.

### **In case of out of court settlements: judicial control**

If the case is settled out of court and there is no need to get the court's confirmation for the settlement, there is accordingly no specific judicial control mechanism..

## **3. Available remedies**

Several different remedies are available including injunctions and the payment of damages. In this regard the ordinary procedural rules apply. However, punitive or extra-compensatory damages are not available.

An appeal of the decision is possible under the general rules of civil procedure<sup>726</sup>. The Class Action Act allows a member of the group to appeal against a judgment or final decision on behalf of a group and also a decision on approval of a risk agreement. A member of the group is also entitled to appeal, on its own behalf, against a judgment or a decision that concerns its rights<sup>727</sup>.

## **4. Costs & funding**

For group proceedings, the ordinary rules on litigation costs (namely the losing party pays) apply in principle. The plaintiff in a group action thus bears the litigation costs (including those of the defendant) if he or she loses the case<sup>728</sup>. The rules on litigation costs represent a compromise. They try to create a balance between providing sufficient stimulus for bringing group proceedings, on the one hand, and eliminating or at least minimizing possible abuse of such proceedings for unfair profit purposes<sup>729</sup>.

Members of the groups are in principle not liable for litigation costs. They can be held liable to bear only part of the litigation costs corresponding to their benefit from the proceedings and only if the defendant has been ordered to pay and cannot pay, or if as a result of their conduct they have incurred additional litigation costs<sup>730</sup>. The same applies to additional costs in connection with risk agreements which the defendant has not been ordered to pay<sup>731</sup>.

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<sup>726</sup> Class Action Act, Sections 42 - 48.

<sup>727</sup> Class Action Act, Section 47.

<sup>728</sup> The Code of Judicial Procedure, Chapter 18.

<sup>729</sup> Class Action Act, Sections 33 - 36.

<sup>730</sup> Class Action Act, Sections 33 - 36.

<sup>731</sup> Class Action Act, Section 41.

## 5. Lawyers' Fees

The Class Actions Act permits a lawyer to enter into what has been termed a 'risk agreement' with a claimant in a group action, whereby they agree that the attorney will receive a reduced fee if the case is lost and increased fees if the case is won<sup>732</sup>. There are several mechanisms by which the members of the group and the court can control the fairness of such agreements (approval by the court; possibility for notice of dissatisfaction; and appeal of court decision to approve a risk agreement by members of the group). The idea of 'risk agreements' provides no excessive incentives for conducting group proceedings but may overcome the reluctance of some attorneys to engage in what can sometimes be complicated group proceedings. The Swedish legislature categorically rejected any schemes of compensation long the lines of the American "contingency fee" idea. It should be noted that insurance companies in their litigation insurance are inclined to exclude or limit their litigation insurances in respect of group proceedings. This has been considered to be an impediment to the use of the scheme<sup>733</sup>.

## 6. Funding

The law does not envisage that the class representative in a private group action should receive any additional compensation or profit from its participation. If it wins the case, his or her litigation costs will be paid by the losing party. If it loses, the representative in principle will be solely responsible for his or her litigation expenses. However, the representative is in most case expected to receive financial support from outside sources, for example via the Legal Aid Act, from the insurance for legal expenses of the group members, or through a 'risk agreement' with an attorney<sup>734</sup>. The only provisions that provide for relief of the burden of litigation costs are the ones mentioned above, i.e. concerning the liability of group members for the litigation costs if the losing defendant is not in a position to compensate the plaintiff for the litigation costs, in the case of a risk agreement, or for litigation costs incurred through the group members' own negligent conduct, minimizing possible abuse of such proceedings for unfair profit purposes<sup>735</sup>.

A special situation is regulated in Sections 30-32 of Class Action Act. If, in the course of group proceedings, the group representative is found no longer appropriate to represent the group and the court appoints someone else who is entitled to bring an action in accordance with the Sections 4 - 6 in Class Action Act to conduct the group's action as plaintiff, this person is entitled to compensation for litigation costs and for their own work and time expenditure from public funds<sup>736</sup>.

As explained above - the funding of the group proceedings is mainly based on the normal rules on legal costs (the loser pays) and in addition, there are some specific regulation in the Group Proceedings Act. It is also possible that the parties agree on costs. Also, the above described risk agreement is allowed. Then the legal aid from the state (limited) or the private insurance (varies) are possibilities to get funding.

<sup>732</sup> Class Action Act, Sections 38 - 41.

<sup>733</sup> See Lindblom, P H., Lagen om grupprättegång - bakgrund och framtid, SvJT 2005 p.183.

<sup>734</sup> Government bill 2001/02:107, p. 47.

<sup>735</sup> Class Action Act, Sections 33 - 36.

<sup>736</sup> Class Action Act, Section 30.

In addition, there are many creative chances to finance group proceedings in Sweden. In many cases, third party funding is allowed, although the attorney may not pay by himself since that would run contrary to good ethical practices. However, the private entrepreneur or public foundation may provide finance. Also, group members can assist in funding by subscriptions.<sup>737</sup>

## **7. Enforcement of collective actions/settlement**

### **a. Framework for enforcement**

As regards enforcement, there are no special rules for class action judgments and the usual enforcement system applies. Therefore, in enforcement, the group members have a role of a full party even if during the proceedings it is the representative of the group who represents the members and the latter have only restricted a party role<sup>738</sup>.

### **b. Efficient enforcement of compensatory /injunctive order**

As just mentioned, the group members have a role as a full party even if during the proceedings it is the representative of the group who represents the members and the latter have only restricted a party role<sup>739</sup>. This can be criticised from the access to justice point of view. This kind of individual enforcement system is also very bureaucratic. Some kind of system of group enforcement should exist in order to minimize bureaucracy and maximize access to justice. In addition, the class 'members' who did not opt-in are outsiders and they have no rights based on the class action judgment. Still, the judgment has no *res judicata* effect on them. Therefore, it is open to them to start a new procedure if they like and if they need the execution title for themselves. The above described lack of collective enforcement procedure has been criticised and it has been suggested that the system should be changed in the future in order to make class actions more powerful. In the *travaux préparatoires*<sup>740</sup> the group enforcement in the name of the representative of a group was suggested<sup>741</sup> but the proposal did not go through<sup>741</sup>.

### **c. Cross border enforcement**

There is no specific regulation on international class actions. Normal rules which cover international procedural law and private international law therefore apply.

## **8. Number of claims**

In Sweden, we have the longest tradition of class actions out of the Nordic countries and there have also been some successful class action cases<sup>742</sup>. Others have been dismissed<sup>743</sup> or cancelled<sup>744</sup> or they have ended with a

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<sup>737</sup> Lindblom 2008, pp. 163 – 167.

<sup>738</sup> Class Action Act, Sections 15 and 29.

<sup>739</sup> Class Action Act, Sections 15 and 29.

<sup>740</sup> SOU 1994:151, pp. 459 - 462.

<sup>741</sup> For this discussion, see for instance Lindblom 2008, pp. 103 - 104.

<sup>742</sup> For instance, so called SLU -case, RH 2009:90.

<sup>743</sup> Stockholm district court, T 17333-04 (and10992-04). The court decided that the Aftonbladet case did not fulfill the requirements to be litigated as class action. The same

friendly settlement<sup>745</sup>. Even in the latter cases, the possibility to continue with the help of class action may have played a significant role in negotiations. Most of the class actions have been individual class actions, however, most were sued by associations which are established solely for the purpose of bringing the class action<sup>746</sup>. The first public class action against the electricity company was successful and the company had to pay damages to its clients<sup>747</sup>. The total amount of all cases is under 25.

## **9. Impact of the Recommendation /problems and critiques**

### **a. Incompatibilities with the Recommendations principles**

The Swedish legislator has not yet taken any steps in promulgating the conditions of the Commission Recommendation from the 11 June 2013 on common principles for injunctive and compensatory collective redress mechanism in the Member states concerning violations rights granted under Union Law (2013/396/EU). However, this is not surprising as most of the points raised in the Recommendation are already fulfilled by the present legislation. However, there is no national registry yet as the number of cases are so few, but the legislation is considered to work well.

### **b. Problems relating to access of justice/fairness of proceedings**

There are some critiques of the Swedish Group Proceedings Act. The system is based on the opt-in system only, which is neither effective nor simple from the consumers' perspective. The opt-out system could be better to cover the interests of consumers. As long as procedures (regardless of whether they are individual or collective proceedings) are too complicated and time consuming<sup>748</sup>, access to justice is not fully achieved.

Based on the existing Nordic experiences, building up a group to start the class action takes approximately two years. It is considered to be too complicated and long-lasting especially if interest in the case is low<sup>749</sup>. Even if the aim of class action acts were to assist in getting single consumers access to court, the same problem still exists. In addition, there is no case-law at all or at least there is a low level of experience. Therefore, there are many questions which are still open in legislation and doctrine.

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covers Nacka district court T 855-12 which covered the case against the children-home. The case on private alcohol import was partly cancelled and partly dismissed, Nacka tingsrätt, 29.4.2011, T 1286-07.

<sup>744</sup> Skandia case, Stockholm district court T 97-04. Instead of class actions the case was resolved by arbitration and the plaintiffs got their compensation. Therefore the case was anyways successful.

<sup>745</sup> For instance Stockholm district court T 3515-03/ Nacka district court, T 1281-07 and Gothenburg district court T 7247-05.

<sup>746</sup> The first 12 cases are commented in Lindblom Per Henrik: Grupp-talan i Sverige. Norstedts Juridik 2008, pp. 209.

<sup>747</sup> The Court of Appeal in Övre Norrland 2011-11-04, T 154-10.

<sup>748</sup> About the length of the Nordic class actions, please, see Viitanen, Klaus: Nordic Group Actions: First Experiences and Future Challenges, JFT 3-4/2009 pp. 599-613.

<sup>749</sup> Similar thoughts and experiences in the Nordic report: TemaNord 2006:583 "Consumers' right of action in antitrust cases - Current problems and future solutions". Available on the web: <http://www.norden.org/fi/julkaisut/julkaisut/2006-583>, last visited on 24 November 2012.

*Res judicata* is limited to the members of the group who have opted-in. The systems are totally based on the opt-in method<sup>750</sup> and the *secundum eventum litis*-phenomenon does not exist. In addition, there are no differences between *res judicata* in different types of claims but the usual *res judicata*-effect covers all kinds of judgments in the similar way and there is no difference depending on the fact if the judgment is favourable or not. Even if the class action is facing a public body or administration, there are no specialties in relation to *res judicata* but the normal doctrine is followed.

Regarding enforcement, there are no special rules for the enforcement of judgments obtained following a class action and the usual enforcement system applies. Therefore, in enforcement, the group members have a role as a full party even if during the proceedings it is the representative of the group who represents the members and the latter have only a restricted party role<sup>751</sup>. This can be criticised from the access to justice point of view. This kind of individual enforcement system is also very bureaucratic. Some kind of system of group enforcement should exist in order to minimize bureaucracy and maximize access to justice. In addition, the class 'members' who did not opt-in are outsiders and they have no rights based on the class action judgment. Still, the judgment has no *res judicata*-effect on them. Therefore, they can start a new procedure if they like and if they need the execution title for themselves.

The lack of effective enforcement procedures described above has been criticised and it has been suggested that the system should be changed in the future in order to make class actions more powerful. In the *travaux préparatoires*<sup>752</sup> the group enforcement in the name of the representative of a group was suggested but the proposal did not go through<sup>753</sup>.

## **II. Sectoral Collective Redress Mechanisms**

### **A. Consumer Law- group action at the National Board for Consumer Disputes**

#### **1. Scope**

The main scheme for settlement of disputes between individual consumers and individual business operators in Sweden is through the Swedish National Board for Consumer Disputes (*Allmänna reklamationsnämnden*, ARN). This is a public body for out-of-court dispute settlement specialising in business-to-consumer matters.

The legal basis for group proceedings at the National Board for Consumer Disputes is Section 9 of the Standing Instruction for the board.<sup>754</sup> The

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<sup>750</sup> Class Action Act, Section 29 and the Finnish Act on Class Action, Section 11.

<sup>751</sup> Class Action Act, Sections 15 and 29.

<sup>752</sup> SOU 1994:151, pp. 459 - 462.

<sup>753</sup> For this discussion, see for instance Lindblom 2008, pp. 103 - 104.

<sup>754</sup> Förordning 2015:739 med Instruktion för Allmänna reklamationsnämnden, c.f. lag (2015:671) om alternativ tvistelösning i konsumentförhållanden, directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and EU regulation 524/2013 of the 21 of May 2013 on alternative dispute resolution online for consumer disputes, c.f. Förordning 2009:607,

National Board of Consumer Disputes, ARN, may consider consumer disputes between a group of consumers and an individual business operator where:

- a) there are several consumers who are likely to have a claim against the trader on substantially similar grounds;
- b) the disputes concerns conditions that may be considered by the Board and;
- c) an examination of the disputes is justified in view of the public interest.

The ARN is competent to give recommendations in disputes concerning goods and services that have been provided by the tradesman to the consumer. However, the following types of disputes are outside the scope of competence of the ARN: disputes between individuals or between business operators, disputes concerning health care, disputes concerning the purchase or rent of real estate, tenant-ownership, or leasehold, rental disputes that concerns another issue than money. A dispute cannot be decided by the Board if it is pending before, or is already decided by, an ordinary court; or if the dispute can be tried, or has been tried, by a public authority; or by a board that has been approved as a board for alternative disputes resolution or if an ARN recommendation has already been issued in the same matter.

Additional limitations have been set by the Board. A complaint must be lodged no later than a year after the consumer has made a complaint to the trader, 8 § p. 3. There is also a threshold in terms of the minimum value of disputes decided by the Board.

## **2. Procedural framework**

### **a. Competent authority**

The National Board for Consumer Disputes (*Allmänna reklamationsnämnden*, ARN) was already set up in 1968, as part of the then consumer policy. The Swedish National Board for Consumer Disputes consists of the Chairman (who is also the administrative head of the agency), a Vice-chairman, external Chairmen of the different departments and their members. The Chairman, Vice-chairman and Chairmen of the divisions are lawyers qualified for the bench (§ 26 Instruction). The Chairman and Vice-chairman of the Board (after proposal from the Chairman) and the Chairmen of the departments are appointed by the Government. The other members of the Board are nominated by consumer, labour, industry and other groups 11-16 §§.

### **b. Standing**

According to section 9 of the Standing Instruction, proceedings can be initiated by the Consumer Ombudsman on behalf of a group of consumers (group action); or by a group of consumers if the Consumer Ombudsman has declined to initiate proceedings.

The Director General of the Swedish Consumer Agency is the Consumer Ombudsman (Konsumentombudsman, KO). The Swedish Consumer Agency is a state agency whose task is to safeguard consumer interests. The KO can represent consumer interests in relations with business traders and pursue legal action in the courts.

### **c. Opt-out procedure**

Group proceedings before the National Board of Consumer Disputes are based on an opt-out principle. The claim extends automatically to all members of the group without a need for an active step to be made by every consumer. This makes the procedure feasible.

### **d. Main procedural rules**

The procedure is entirely in written form without any oral evidence. The Board informs the trader against whom a complaint has been lodged and gives him or her the opportunity to make written observations. The dispute is considered by the Board even if the trader does not make any observations. The parties are not entitled to be present at the meeting of the panel.

A department constitutes a quorum when the Chairman, Vice Chairman or external Chairman and four members are present, representing equally consumers and tradesmen, 30 § of the Standing Instructions of ARN. A department also constitutes a quorum with the chairperson and two other members, unless one of the members requests that four members participate. A matter can be decided only by the Chairman, Vice Chairman or external Chairman if it is of simple nature or if the business has not commented upon it.<sup>755</sup> If the members of the Board disagree on the verdict, the rules in Chapter 16 of the Civil Procedural Code<sup>756</sup> apply (Chapter 16 concerns voting in civil cases). The ARN decision is not subject to appeal, but can, subject to certain conditions, be reviewed.<sup>757</sup> The decision may be reviewed where a decision was obviously incorrect due to a clear oversight or error by the Board and correction of the decision cannot be considered. As already mentioned, no oral evidence can be collected.

## **3. Available remedies**

The ARN issues a recommendation as to how the dispute should be settled. The Board can only pronounce itself on issues of contractual liability.

It can recommend both conduct and monetary remedies. The most typical remedy is compensation for damages due to breach of contract. ARN issues a recommendation in which it can recommend how the dispute should be settled. The decision is not enforceable. Nevertheless, there is a high rate of compliance among business operators with the recommendations of the Board, approximately 77 % (end of June 2016). The duration of handling a case in 2016 averaged 85 days.

## **4. Costs**

Proceedings are free of charge for the parties. The parties are, at the same time, not entitled to compensation for the costs of legal representation or other costs for preparing and participating in the procedure. The absence of any fees is one of the main advantages of the procedure. In case the Consumer Ombudsman initiates the group proceeding, the cost of legal representation etc. stays on the Consumer Agency.

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<sup>755</sup> 30-31 §§ of the Standing Instructions

<sup>756</sup> See SFS 1942:740.

<sup>757</sup> 35-36 §§ of the Standing Instructions

## **5. Lawyers' fees**

See above under 3 and 4.

## **6. Funding**

See above under 3 and 4.

## **7. Number of claims**

As mentioned above, the duration for handling a complaint was in 2016 on average 85 days. The number of cases was 13 537, mostly regarding travel (2 636), motors (2 369), electronics (2 143) and housing (real estate, tenant-ownership etc, 1 795). The Board also found itself forced to reject 3 507 applications, because the consumer did not submit additional information, which the Board had requested. Another cause for rejection was that the dispute did not reach the demands in terms of value of the claim. A third cause was that the case was too complex, to time-consuming for the Board to handle.

## **8. Other interesting legislation**

The Swedish Consumer Ombudsman can act as a representative of individual consumers before ordinary courts in proceedings between a consumer and a business operator.<sup>758</sup>

A prerequisite for the Consumer Ombudsman to intervene in a lawsuit in support of the consumer is that the case is of particular importance for law-building and legal interpretation and that there is a general consumer interest in the dispute being tried by a court of law (cf. § 2).

The Consumer Ombudsman may also act in protection of collective consumer interest in market law and unfair contracts terms. The consumer Ombudsman may in certain cases of minor importance issue a prohibition order or information disclosure order (§ 28 of the Market Practices Act, 2008:486). A trader whose marketing is unfair may be prohibited from continuing with it, 23 §. A trader who, in his marketing, fails to provide material information may be requested to leave such information, 24 §. A service provider under the Act on Electronic Commerce etc., 2002:562, who fails to provide the technical means provided for in the Act, may be required to provide such aids. If the Consumer ombudsman gives such an order and it is approved by the trader, it has the effect of a decision by the Patent- and Market Court, 28 §. The Consumer ombudsman may determine that the injunction (prohibition order or information disclosure) should apply immediately.

The Swedish Patent- and Market Practices Court is a specialized court competent to examine cases under a number of market law statutes, like the Market Practices Act and the Unfair Contract Terms Act.<sup>759</sup>

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<sup>758</sup> The legal basis is stated in Lag (2011:1211) om Konsumentombudsmannens medverkan i vissa tvister (Act on Participation of the Consumer Ombudsman in certain disputes)

<sup>759</sup> see lag (1994:1512) om avtalsvillkor i konsumentförhållanden



The Consumer Ombudsman has also the possibility to initiate proceedings under the Market law Act or the Unfair Contracts Terms Act at the Patent- and Market Court, 47 §.

## **B. Competition Law**

The Swedish Competition Authority has the power to issue prohibitory orders within the area of competition.<sup>760</sup> The Swedish Competition Authority, which is a state agency under the Ministry of Enterprise, places particular emphasis on anti-cartel enforcement, intervening when private and public stakeholders abuse a dominant position in the market, and intervening in respect of anti-competitive sales activities by public entities. The directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states has been implemented in the Swedish konkurrensskadelagen (2016:964).

## **II. Information on Collective Redress**

### **1. National registry**

At the moment there is no national registry as the cases are so few in number.

### **2. Channels for dissemination of information on collective claims**

The dissemination of information can occur in a number of different ways and there is a wide discretion to find the most suitable way. In this consideration, practical and economic reasons are the most important factors. When the notifications are concerned, the court may even order a party to attend the notification provided this has significant advantages for the processing. This possibility covers both the plaintiff and the defendant. However, the party is in such a case entitled to compensation from public funds for expenses. The court may use, for instance, letters, e-mails, notice boards, newspapers, TV, radio, social media or court's webpage to give the notification. The possibility of using the parties, especially the defendant, to do this is a very practical way to realize the notification whenever the defendant still has regular correspondence with the members, for example in the form of invoicing. In that case, the notification can be done at the same time and only the extra costs caused by the notification are compensated from public funding to the party. The party has to cover the normal invoicing costs even in that case by itself. The court may use fines as a coercive measure to get the party to fulfill its duties in notification.<sup>761</sup>

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<sup>760</sup> See 2008:579, Competition Act

<sup>761</sup> Group Action Act, Section 50, Lindblom 2008, pp. 572 – 578 and Government bill 2001/02:107, pp. 181 – 182.

### III. Case Summaries

#### 1. General

##### A. Table

Year Court	Subject	Keyword
2016 Nacka district Court	Sales Law	Private Group Action
2016 Nacka District Court	Private law	Private Group action
2014 Nacka District Court	Damages indignity	for Organisational group action
2013 Göta Court of Appeal	Damages	Organizational group action
2012 The Supreme Court, 2045-12	T Public law, Free movement of goods, restitution	Private group action.
2011 Svea Court of Appeal, 6573-11	Ö General principles of law	
2009 The Court of Appeal for northern Norrland, November 2011, T 154-10	Consumer 4 contract law	law, Public group action, Breach of contract, damages awarded
2009 Svea Court of Appeal, 3552-09	T Discrimination Higher education act	law, Private group action, Damages awarded
2006 Svea Court of Appeal, 6868-06	Ö Contract law	Private group action
2005 Svea Court of Appeal, 810-05	Ö Contract law	Breach of contract, procedural hindrance
2012 District Court Gothenburg, T 7211-03	of Contract law	Action withdrawn
2011 District Court of Nacka, 3385-09	T Contract Banking claim	law, Settlement out of court services,
2009 District Court of Malmö, 9330-09	T Discrimination law	Damages awarded, settlement out of court
2009 District Court of Nacka, 5127-09	T Public law	Unfair commercial practice, Claim for restitution of time lost
2009 District Court Gothenburg, T 271-09	of Contract law	Ambiguous contractual terms
2006 District Court Stockholm, T 9593-06	of Public law	Case dismissed

<b>Year</b>	<b>Court</b>	<b>Subject</b>	<b>Keyword</b>
2006	Environmental Court Nacka, M 1931-07	of Environmental law	Proceedings are stayed
2005	District Court Gothenburg, T 7247-05	of Contract law	Ownership, settlement
2004	District Court Stockholm, T 97-04	of Declaratory compensation claim	Claim for compensation, settlement in arbitration
2003	District Court Stockholm, T 6341-03	of Public law, data act	Damages awarded
2003	District Court of Nacka, T 1281-07	Contract law	Settlement out of court

## **B. Summaries**

1. District Court of Nacka, T 37-15, 9<sup>th</sup> of February 2016

Jerod Mund ./ KnCMiner AB

Private group action. Questions regarding sales law. Action dismissed as the certification criteria in Section 8 in the GRL was not met. The case was appealed to Svea Court of Appeal who decided not to try the case. The plaintiff sued the company later on in a normal civil case at the District Court of Stockholm where the plaintiff lost the case, case T 14917-14, 2016-04-29.

2. District Court of Nacka, T 7124-15, 28<sup>th</sup> of January 2016

Mikael Ljunggren ./ Dalbo Båtsällskap

Private group action. The action was dismissed as the plaintiff had claimed that the counterparty should apologize, which was a claim that not could be enforced.

3. District court of Nacka, T 1982-14, 11<sup>th</sup> of September 2014

### **Reclaimjustice vs Sverige .7. Staten genom Justitiekanslern**

Organization group action. Action dismissed as the criteria in Section 5 in the GRL was not met.

4.. Court of Appeal, Göta hovrätt, 3<sup>rd</sup> of June 2013, Ö 3152-12.

### **Intresseföreningen för spararna i Habo Finans ./ A. Claesson med fl.**

Organizational group action. Damages for mismanagement. Action dismissed as the criteria in Section 8 in the GRL was not met. See also case at the District Court of Jönköping, 2012-10-16, case 1108-12.

5. Supreme Court, 3 May 2012, T 2045-12, Vinimport

### **Torkel Jörgensen ./ Sweden**

Private group action. Question of damages due to alcoholic beverages being confiscated by the state. Question about restitution. The action was rejected by the district court of Nacka; Svea Court of Appeal affirmed the judgement, T 4402-11. Appealed to The Supreme Court, which did not review the case. Decision by the Supreme Court 2013- 08-15.

6. Svea Court of Appeal, 25 November 2011, Ö 6573-11, Eritreanska föreningen

**Eritrean association of Husby ./.** **Eritrean national federation of Sweden**

Question of abolishing the annual meeting of a non-profit association. Case dismissed due to no section of law being applicable. Svea Court of Appeal denied the appeal.

7. Court of Appeal for northern Norrland, 4 November 2011, T 154-10, Kraftkommission

**The Consumer Ombudsman ./.** **Stävrullen Finance AB**

Public group action. Damages due to the defendants' failure to supply electric power. On-going case. Intermediate judgement is delivered, affirmed by the Court of Appeal for Northern Norrland. The Supreme Court denied review permit for the intermediate judgement.

8. Svea Court of Appeal, 21 December 2009, T 3552-09, Veterinärutbildningen

**Olivia Rozum ./.** **Sweden**

Private group action. Damages due to discrimination regarding university entrance. Affirmed by Svea Court of Appeal.

9. Svea Court of Appeal, 25 September 2006, Ö 6868-06, Telia

**Devitor AB ./.** **TeliaSonera AB**

Private group action. Refunding of the difference between the amount being billed during a particular period and the agreed rate. Case dismissed due to the members of the group could not be defined. Appealed to Svea Court of Appeal but was later withdrawn.

10. Svea Court of Appeal, 5 January 2005, Ö 810-05, Aftonbladet

**Linus Broberg & Henrik Skepland ./.** **Aftonbladet Nya Medier AB**

Private group action. Compensatory damages when participants could not participate in online gaming, due to data transmission problems. Claim was denied due to procedural hindrance. Svea Court of Appeal remanded T 10992-04 to the district court of Stockholm. Svea Court of Appeal denied the appeal of T 17333-04.

11. District court of Gothenburg, 10 February 2012, T 7211-03, NCC

**Guy Falk & Lisbeth Frost ./.** **NCC AB**

Private group action. Demand for performance of contractual obligation. Action withdrawn.

12. District court of Nacka, 17 June 2011, T 3385-09, Handelsbanken

**Tobias Karlsson ./.** **Svenska Handelsbanken AB**

Private group action. Damages due to negligence from the bank when a person, who did not have the right to do so, withdrew money from an account.

13. District court of Malmö, 4 March 2010, T 9330-09, Psykologutbildningen

**Elin Sahlin ./.** **Sweden**

Private group action. Damages due to discrimination regarding university entrance. Settlement out of court.

14. District court of Nacka, 22 March 2009, T 5127-09, Norrtäljeanstalten

**Jan-Erik Mariniusson ./. P&M Reklam AB & Swedish Prison and probation service**

Private group action. Claim for damages due to the difference in payment between divisions in the prison. Claim for refunding of the difference between the actual price of goods in the prison kiosk and the price that would have been fair. Case dismissed due to procedural hindrance. Review permit denied by Svea Court of Appeal also claim for restitution of time lost.

15. District court of Gothenburg, 4 March 2009, T 271-09, Parkeringservice

**Marie Lundberg ./. Hojab Parkeringservice**

Private group action. Claim of repayment of parking fine due to ambiguous contractual terms. The case was first filed at the district court of Solna as T 5918-08. The case was transferred, due to court competence, to the district court of Gothenburg, where the case was dismissed due to the larger part of the claims being held to be equally well pursued through personal actions by the members of the group.

16. District court of Stockholm, 26 June 2006, T 9593-06, Stulen barndom

**Peter Lindberg ./. Municipalities of Storstockholm**

Private group action. Question of compensatory damages due to poor care in municipal orphanages. Case was dismissed due to the special investigation that was needed for each member of the group, which would go against the intent of the law.

17. Environmental court of Nacka, 29 August 2006, M 1931-07, Arlanda

**Carl de Geer et al. ./. Air Navigation Services of Sweden**

Private group action. Question of damages due to aviation noise. On-going case, proceedings are stayed, to be resumed on request from litigant.

18. District court of Gothenburg, July 2005, T 7247-05, Fjärrvärme

**Lars Elnér & Vuokko Elnér ./. Göteborgs Egnahems AB**

Private group action. Question of the ownership to an electric power facility. Settlement out of court.

19. District court of Stockholm, 5 January 2004, T 97-04, Skandia

**Grupptalan mot Skandia ./. Skandia AB**

Private group action. Right to compensation due to the fact that policyholders of a company suffered injury when proceeds of sales were transferred to another company. An arbitration tribunal settled the case and the group action was withdrawn.

20. District court of Stockholm, April 2003, T 6341-03, Dataregister 1

**Johan Asplund et al. ./. Falck Security AB**

Private group action. Information collected regarding suspected, but not convicted, taggers. An action regarding the right of registration of personal data. Case was appealed to Svea Court of Appeal by the defendant but was later withdrawn.

21. District court of Stockholm & Nacka, January 2003, T 3515-03 & T 1281-07, Aer Olympic

**Bo Åberg ./ Elefterios Kefalas**

Private group action. Damages due to several hundred passengers having been left stranded at the airports when the company went bankrupt. Settlement was made in 2007.

**1. Consumer law**

**A. Table**

<b>Year</b>	<b>Court</b>	<b>Subject</b>	<b>Keyword</b>
2003	The National Board for Disputes, 2003-6529	Consumer law, contract law	Breach of contract
2010	The National Board for Disputes, 2010-4253	Contract law	Unreasonable contractual terms
2010	The National Board for Disputes, 2010-6177	Contract law	Dissenting opinions
2014	National Board for Consumer Disputes, 2014-09369	Contract Law	Damages
2014	National Board for Consumer Disputes, 2014-11304	Financial law	Compensation for overcharging a management fee

**B. Summaries**

1. The National Board for Consumer Disputes, 4 July 2004, 2003-6529

**The Consumer Ombudsman ./ Kraftkommission i Sverige AB**

Damages due to the defendants' failure to supply electric power. This case was later tried in The Court of Appeal for Northern Norrland, case number T 154-10.

2. The National Board for Consumer Disputes, 14 March 2011, 2010-4253

**The Consumer Ombudsman ./ Hammarö Energi AB**

Question about adjustment of contractual terms due to increased administrative costs in a contract which was limited in time.

3. The National Board for Consumer Disputes, 9 May 2011, 2010-6177

**The Consumer Ombudsman ./ Viking Airlines AB**

Declaratory claim for damages due to cancelled aircraft transportations between Iraq and the Nordic countries. The case was partly dismissed and partly rejected due to court competence.

During 2010, for example, ARN received a group complaint concerning district heat delivery. The complaint was filed by KO against a district heating company (Hammarö Energi AB.) ARN stated that the company was not entitled to charge certain of its district heating customers for administrative overheads, no provision to this effect being made in the contract between the parties<sup>762</sup>.

4. National Board for Consumer Disputes, 2014-09369, final decision 18<sup>th</sup> of March 2016

**Konsumentombudsmannen ./ Gotlandsbåten AB**

The Swedish consumer ombudsman recommended the company Gotlandsbåten AB to compensate the consumers who had entered into an agreement with the company for certain travel trips for the damage caused to them due to the cancellation of the trip.

5. National Board for Consumer Disputes, 2014-11304, 1<sup>st</sup> of July 2015.

**Sveriges Aktiesparares Riksförbund ./ Swedbank Robur Fonder.**

The cases involved compensation for overcharging a management fee. The National Board of Consumer Disputes decided not to review the case as the case needed oral evidence and oral preparation of the case.

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<sup>762</sup> See case 2010- 4253, decided on 2011- 03-14. See further [www.arn.se](http://www.arn.se).

# UNITED KINGDOM – FACTSHEET

## Scope

The generally available collective compensatory procedures are: group litigation orders (GLO), representative actions (under CPR 19.6) and test cases

For sector specific mechanisms:

The Competition Act 1998 s 47B-E provides an alternative means of collective redress for claimants to bring collective claims in competition cases.

Remedy: compensation and/or an injunction

The 2015 Consumer Rights Act broadened the scope of redress available to consumer enforcers to include compensation and not solely injunctive relief.

## Standing (Para. 4-7)

There are no special rules on standing to bring a compensatory collective redress action under general collective redress mechanisms in England — normal legal capacity is sufficient.

**Competition mechanism:** it must be “just and reasonable” for the applicant to act as a class representative in the collective proceedings. The tribunal must consider whether the proposed representative would in all the circumstances fairly and adequately act in the interests of class members

**Consumer mechanism:** only those public bodies either set out in the Enterprise Act itself (the OFT, Trading Standards Offices - run by local authorities - and certain public consumer protection or regulatory bodies) or a private body designated by the minister may apply. To date the only non-public body to be designated is the Consumers' Association (Which?).

## Problems/Incompatibilities with Recommendation principles

There is no requirement that the representative in representative proceedings (CPR 19.6) should have a non-profit motive

## Admissibility (Para. 8-9)

Admissibility is decided at the earliest stage of the proceedings.

**Representative actions:** it is open to the court, either on its own motion or on the application of any person with an interest, to direct either that the claim should not be continued as a representative claim at all, or that the representative should be replaced with an alternative.

**Competition mechanism:** the tribunal determines the eligibility of the claim based on three requirements:

- the claims must be brought on behalf of an identifiable class of persons;
- the claims to be included in the proceedings must raise “common issues”; and
- the claims must be “suitable” to be brought in collective proceedings.

## Information on Collective Redress (Para. 10-12, 35-37)

Various privately-run websites offer information on collective redress

The national GLO list can be accessed at <https://www.gov.uk/guidance/group-litigation-orders>

Information in applications for competition CPOs is on the CAT website: <http://www.catribunal.org.uk>



### **Funding (Para. 14-16)**

Funding for collective redress claims comes from private sources — either litigation funders or the law firms which are representing the claimants.

Civil legal aid from government sources has all but disappeared in the UK in recent years.

### **Problems/Incompatibilities with Recommendation principles**

Most larger collective claims are funded by a third party and/or law firm in some way. There is no legislative or public administrative control of funders in the UK.

However, at common law, anyone who improperly funds the litigation of another may be found liable for all of the (adverse) costs of that litigation if the case is lost.

### **Cross Border Cases (Para. 17-18)**

There are no rules preventing claimants residing outside the UK from joining a GLO.

**Competition mechanism:** any victim of a competition law infringement may opt-in to a UK collective competition proceeding regardless of nationality or residence. However, an opt-out CPO order will only bind those class members who have not opted out and who are domiciled in the UK at the time set out in the order. However, even in an opt-out proceeding, non-UK residents may nevertheless decide to opt in.

### **Problems/Incompatibilities with Recommendation principles**

Consumer mechanism: foreign claimants have no standing to bring an application as they are not specified in the Act, nor have any non-UK bodies been designated by the Minister.

### **Expedient procedures for injunctive orders (Para. 19)**

The court can make an interim injunctive or declaratory order at any time – even before a claim has been commenced – in cases of urgency or where it would be in the interests of justice to do so.

### **Efficient enforcement of injunctive orders (Para. 20)**

Refusal to comply with an injunction or similar order — which is endorsed with a 'penal notice' (a warning that non-compliance is a criminal offence) — may be enforced through contempt of court proceedings. A court may make an order committing the defaulter to prison or may impose a lesser sanction – a fine or sequestration of goods, for example.

### **Opt In/Opt Out (Para. 21-24)**

The general compensatory collective redress mechanisms in the UK are opt-in only, with the exception of representative actions. An order or judgment in a representative action is binding on all persons represented, even if they were not parties to the proceedings and even if they were unaware that the proceedings were underway.

Competition mechanism: the collective proceedings order allows both an 'opt-in' and an 'opt-out' system, at the discretion of the Tribunal. Opt-in is the starting point with opt-out being made available if necessary in the interests of justice.

### **Collective ADR and Settlements (Para. 25-28)**

The court is entitled to 'encourage' parties to use ADR (CPR rule 1.4(2)(e)) and may impose sanctions on them in costs if they unreasonably fail to do so.

Pre-action conduct requires parties to consider ADR. Competition mechanism: The tribunal may refuse to make a CPO if it thinks that the dispute could better be resolved using a form of ADR.

### **Costs (Para. 13)**

The Loser Pays Principle applies however, the court may make a different order if the loser was partly successful, the conduct of one or the other of the parties was unreasonable or where an offer to settle was made which was rejected but could have dealt with the claim earlier.

In cases under £10m in value parties are required to complete a costs budget which will be approved by the court. Recoverable costs are then limited to those set out in each party's budget.

To attempt to keep costs predictable and proportionate in GLO cases, courts have sometimes applied costs caps to the amount parties may recover in costs if they win.

Where a party has entered into a conditional fee agreement it will be unable to recover the success fee element from the losing party.

### **Lawyers' Fees (Para. 29-30)**

In England, contingency fees are permitted, but subject to some limitations:

- subject to a cap of 50% of recoveries.
- the DBA agreement must be in writing and there are ethical rules for lawyers requiring them to explain carefully to their clients the effect of the DBA

### **Problems/Incompatibilities with Recommendation principles**

The court does not review and approve conditional fee agreements. However, a client may apply to have the reasonableness of his solicitor's costs assessed.

### **Prohibition of punitive damages (Para. 31)**

Punitive (exemplary) damages are only available in England and Wales in very rare circumstances. The defendant must have known he was acting unlawfully and continued with the conduct in the expectation that his gain from the unlawful act would exceed any compensation that could be awarded to the claimants.

Exemplary damages have not been awarded in collective redress actions.

Not available for competition mechanism

### **Problems/Incompatibilities with Recommendation principles**

Punitive damages available

### **Collective Follow- on actions (Para 33-34)**

It is not a pre-requisite for a competition claim that a public authority should have first made an infringement decision, although both of the applications made (to mid-2017) have followed on from a competition authority decision.

### **Interplay between injunctions and compensation across all sectors**

Both injunctions and compensation are available under the collective redress mechanisms.

# UNITED KINGDOM – REPORT

## I. General Collective Redress Mechanisms

### 1. Scope

Injunctive or Compensatory

In common with other common law countries, the more developed general collective redress mechanisms are used almost exclusively to claim compensation on behalf of a dispersed group of victims. The general mechanisms described under paras. (a) to (c) of this section are used to claim compensation (damages).

However, some non-compensatory mechanisms have been used to obtain redress – in particular for consumers:

- a declaratory judgment may be applied for in order to obtain a definitive ruling that a trading practice is unlawful. For example in *Office of Fair Trading v Abbey National plc* ([2009] UKSC 6) the main UK national consumer authority applied to the court for a declaration to determine the extent of its power to assess the fairness of bank fees on consumer accounts under EU consumer protection provisions
- designated public authorities may also apply for injunctions to protect the interests of consumers – (see section III B)
- a competition collective proceedings order for an injunction may be applied for under s 47A Competition Act 1998 (see III A below).

The generally available collective compensatory procedures are:

#### a. Group litigation orders

Group litigation orders (GLO) are made under CPR 19.11. A GLO may be made where there are a 'number' of claims 'giving rise to common or related' issues of law or fact. It follows that:

- no claimant or body has the right to commence a GLO proceeding: whether the order should be granted will be in the court's discretion;
- the minimum number of parties to a GLO appears to be two, although in practice a greater number is likely to be needed to justify the use of the procedure; and
- the degree of similarity of the issues to be tried under the GLO is fairly flexible — 'related' issues may be sufficient.

#### b. Representative actions

A representative action is a claim brought by one or more claimants, on their own behalf and on behalf of others under CPR 19.6. A representative claim may be begun in cases where more than one person has the same interest in the claim as the claimant, so;

- a representative has the right to bring a collective claim but the court may order that the representative element be discontinued or that another representative be appointed;

- the representative must have the same interest in the claim as each person represented: this has been restrictively interpreted<sup>763</sup> - it is not enough that the claims be similar or related.

### **c. Test cases**

Apart from the use of the test case mechanism in GLOs, the English CPR does not make express provisions for the bringing of test cases on a general basis. However, test cases have been brought by agreement between claimants and defendants (as in the Office of Fair Trading's case on overdraft charges<sup>764</sup>) and/or by way of an application for a declaration by a typical claimant or a representative or government body.

## **2. Procedural Framework**

### **a. Competent Court**

A GLO application may be made in any court able to hear the underlying civil claims. However, a group litigation order may not be made unless the senior judge in that court (the Head of Civil Justice, Chancellor or President) consents.

### **b. Standing**

There are no special rules on standing to bring a compensatory collective redress action under general collective redress mechanisms in England — normal legal capacity is sufficient. A declaration will be given only where it is likely to have a practical effect for the future conduct of the (applicant) parties or of other concerned persons (*Roll Royce plc v Unite* [2009] EWCA Civ 387 — admitting an application by a trade union on behalf of its members on the scope of their employment terms).

### **c. Availability of Cross Border collective redress**

There are no rules preventing claimants residing outside the UK from joining a GLO. However, for the most common types of GLO claims (mass injury, for example) foreign law may apply to non-UK residents' claims, which could make them unsuitable for inclusion in the GLO action. For example, in *Allen v Dupuy International*, ([2014] EWHC 753 and [2015] EWHC 926 (QB)) claims (pre-dating the Rome II Regulation) advanced in a GLO by New Zealand claimants were found to be time barred under applicable New Zealand limitation rules.

### **d. Opt In/ Opt Out**

#### **Principal availability of both options**

The general compensatory collective redress mechanisms in the UK are opt-in only, with the exception of representative actions. Declarations and representative judgments bind all concerned persons, with no possibility of opt-out.

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<sup>763</sup> For example in *Emerald Supplies* [2009] EWHC 741 (Ch)

<sup>764</sup> *OFT v Abbey National* [2009] UKSC 6

## **Conditions for either type (prescribed by law or discretion of the judge)**

A GLO may only be ordered by a judge or senior master. Provided the claims included in the GLO give rise to common or related issues of fact or law, the discretion to make the order – on case management grounds – is a wide one (see below)

### **e. Main procedural rules**

#### **Admissibility and certification criteria**

##### **- Group litigation orders (GLOs)**

The procedure for group litigation orders is contained in CPR 19.10-19.15 and Practice Direction 19B. Two or more claims will already have been commenced using the normal rules for commencing actions contained in the CPR (rule 7). A GLO may be applied for at any time, either before or after the relevant claims have been issued and the application may be made by any claimant or defendant. The court may also make a GLO of its own motion in certain circumstances.

##### **- Representative actions**

There are no special rules for bringing a representative action and any claimant may commence an action on his own behalf and on behalf of all others having the same interest in the claim. It is, however, open to the court, either on its own motion or on the application of any person with an interest, to direct either that the claim should not be continued as a representative claim at all, or that the representative should be replaced with an alternative.<sup>765</sup>

In practice, the court has interpreted the requirement that the interest be 'the same' strictly. One of the reasons for this is that an order or judgment in a representative action is binding on all persons represented, even if they were not parties to the proceedings and even if they were unaware that the proceedings were underway.

##### **- Test cases**

A managing court in a group litigation case may order that one or more of the claims to proceed as test cases. There is no definition of test case and nor are there any criteria given in the rule for how a test case should be selected.

#### **Single or Multi-stage**

GLO cases proceed on a multi-stage basis, with the GLO being made and then the common issues being decided (if not first settled). Any individual issues will also need to be decided in a potential third phase of the relevant claims.

Representative actions and declarations are single stage procedures.

#### **Case-Management and deadlines**

##### **- Group litigation orders**

The GLO must include:

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<sup>765</sup> CPR rule 19.6

- a specification of the GLO issues which will be managed together as a group under the order;
- directions on establishing a group register of the parties to be bound by the findings made under the GLO;
- nomination of a management court.

The GLO may also include an order that all existing claims, which give rise to GLO common issues, should be transferred to the management court be managed under the GLO (and therefore be entered on the GLO register).

Before a claim can be entered on the group register it must be issued (commenced) as an individual claim.

The effect of entry on the group register is that judgment given in respect of any of the group issues will be binding (*res iudicata*) for that issue for all claims on the register at the time the judgment is given. It is however possible for a claim which raises both group issues (e.g. as to liability) and individual issues (e.g. as to quantification) to be entered on the group register for the group issues only and for the individual issues to be tried separately (usually after the finding on the group issues).

The court may provide for one or more of the claims entered on the group register to be used as test claims which are treated as typical of the claims relating to each GLO issue.

The GLO issues will all be tried in the management court designated in the order (although individual issues may be tried elsewhere) and the court may designate the solicitor to one of the claimants to manage the group in relation to the common issues.

#### - **Representative actions and declarations**

No specific case management rules are provided for either of these types of action: the courts' general case management powers are used.

#### **Expediency (particularly in injunctive cases)**

The general CPR (rule 25) allows the court to make an interim injunctive or declaratory order at any time – even before a claim has been commenced – in cases of urgency or where it would be in the interests of justice to do so. This rule applies to collective proceedings as well as to bi-lateral proceedings. The application for interim relief may be made without giving notice to the other party if this can be justified.

#### **Evidence/discovery rules**

Disclosure of documents in England and Wales is provided for in CPR 31. The rule requires 'automatic' disclosure by list of all relevant documents which may either support or undermine the disclosing party's case. The disclosing party is required to carry out a reasonable search for all documents which are or have been under his control, list them (if appropriate by category) and — if they are not available for inspection — state why. Evidence from individuals is given by way of a sworn witness statement setting out what the individual would say if he were called to give evidence in person. Disputed issues in witness statements are resolved by examination at trial.

The position is different in Scotland where disclosure of documents is not 'automatic' but must be requested by the party seeking disclosure.

### **Court directed settlement option during procedure**

There is no rule giving the courts in England the power to require parties to engage in ADR during the collective (or other) proceedings – unless the dispute falls within a valid arbitration clause. However, the court is entitled to 'encourage' parties to use ADR (CPR rule 1.4(2)(e)) and may impose sanctions on them in costs if they unreasonably fail to do so.

## **3. Available Remedies**

### **a. Damages**

Damages are the most frequently claimed remedy under GLO proceedings and are a common remedy for many other collective redress claims (e.g. representative actions). The claimant must show both that the defendant caused the group loss and the amount of that loss. Exemplary (punitive) damages in addition to compensatory damages are a possibility, but an award of exemplary damages is very rare.

Under the GLO procedure, it is open to individual claimants in the group to assert additional claims outside the group issues on the basis of facts which are specific to them: additional claims need not be heard by the GLO management court. Claimants therefore have the ability to establish the liability of the defendant using the GLO procedure and to claim additional damages in a related but separate action if so desired.

In practice a similar outcome applies to test cases for damages - a claimant may or may not choose to bring his own separate claim.

In a representative action by contrast, those represented, who have the 'same' interest in the claim as the representative claimant, are bound fully by the judgment. However as they are not parties the action the judgment may only be enforced against them with the permission of the court. Enforcement of an award of damages against the defendant will be carried out by the representative claimant, not the represented non-parties.

### **b. Injunctions**

Injunctive relief on behalf of a group or a general interest are well established in certain areas of collective redress in England - especially consumer law (see below) where designated bodies have standing to make/apply for 'stop now' orders under specific legislation.

Since injunctions prohibit specific actions by the respondent they will normally also provide a remedy for other potential applicants in a similar situation to the main applicant - akin to a 'test' case approach. An order of a mandatory (positive) injunction - requiring the respondent to do something - is rare.

### **c. Declarations**

The High Court may make a declaration of the law as it applies in a particular novel factual and legal situation - for example, whether 'administrative' overdraft charges by clearing banks operate as an unlawful penalty. A declaration will be binding in relation to those issues not only on the High Court itself but also on all other first instance courts and tribunals.

As with injunctions, a declaration can affect the legal position of non-parties, although that effect will be confined to those in a sufficiently similar factual position to the original defendant. Declarations are not available in relation to

purely hypothetical issues — there must be a real dispute to be resolved — and nor are they available if an award of damages would be the appropriate remedy.

#### **d. Allocation of damages between claimants for compensatory claims**

There are no specific rules on the allocation of damages under a GLO to claims registered on the group register. Where test claim(s) are nominated, then group cases falling within the scope of the test cases are likely to receive an equivalent amount of damages, although even these claimants may have additional heads of claim which are outside the scope of the GLO common issues altogether and where damages will have to be assessed separately.

Similarly there are no specific provisions in the rules on representative actions regarding the allocation of damages awarded, but the requirement that each represented party has an identical interest in the claim strongly suggests that any damages awarded must be divided equally between the represented parties.

There are no express powers in the CPR permitting the court to estimate or to aggregate damages in GLOs or in a representative claim.

#### **e. Availability of punitive or extra-compensatory damages and their conditions**

Punitive (exemplary) damages are only available in England and Wales in very rare circumstances. In essence, the defendant must have known he was acting unlawfully and continued with the conduct in the expectation that his gain from the unlawful act would exceed any compensation which could be awarded to the claimants. Exemplary damages have not been awarded in collective redress actions.

### **4. Costs**

#### **a. Basic rules**

The basic rules governing costs in England and Wales (CPR 44.2) are that:

- the starting point is that the loser pays all of the winning party's costs; but
- the court may make a different order if the loser was partly successful, the conduct of one or the other of the parties was unreasonable or where an offer to settle was made which was rejected but could have dealt with the claim earlier.

The general costs rules apply to collective redress actions (in particular representative actions and GLOs), although they have given rise to difficulties in the case of GLOs. To attempt to keep costs predictable and proportionate in GLO cases, courts have sometimes applied costs caps to the amount parties may recover in costs if they win.

There are special additional rules for costs in GLO cases (CPR 46.6):

- costs are separated into the costs relating to the common issues being tried under the GLO ('common costs') and the individual costs for group members with individual claims;



- the starting point for a costs order in a GLO where the group loses is that each group member is liable for an equal share of the common costs plus the costs relating to his individual issues.

There is however, no joint liability for these costs, so that a group claimant is not liable for another claimant's share of the common costs if the other fails to pay.

In a representative action, since the persons represented are not parties to the claim, costs are not payable by them under the 'costs shifting rule', although the court does retain the power to make costs orders against non-parties, which is available where the particular circumstances of a case appear to require it.

#### **b. Loser Pays Principle**

The starting point for costs awards in general collective redress claims is that the loser pays all of the winning party's costs: the court may, however, make a different order.

### **5. Lawyers' Fees**

In England, contingency fees (damages based agreements: DBAs) have been legal since 2013 for most kinds of claims, but subject to some limitations. For most claims, a DBA may provide for a percentage of compensation recovered to be paid to the legal representative for lawyers' costs — subject to a cap of 50% of recoveries. However, the legal representative must also pay over to his client any costs recovered in the litigation from the losing defendant. This DBA agreement must be in writing and there are ethical rules for lawyers requiring them to explain carefully to their clients the effect of the DBA agreement before the client enters into it.

### **6. Funding**

#### **a. Availability of funding**

Private litigation funding (money advanced on a non-recourse basis in return for a share of any recoveries) is widely available for many types of claims — including most forms of collective redress — in England. It is often combined with a DBA from the legal representatives to create a 'package' for the claimant group, covering all of the costs of a claim in return for a percentage of proceeds.

#### **b. Origins of funding (public, private, third party)**

Funding for collective redress claims comes from private sources — either litigation funders or the law firms which are representing the claimants. Civil legal aid from government sources has all but disappeared in the UK in recent years.

#### **c. Conditions and frequency of resort to third party funding**

Funding agreements are not normally disclosed so it is difficult to estimate the frequency and conditions of litigation funding of claims — although for the larger collective claims, anecdotally most are funded by a third party and/or law firm in some way. The conditions available to victims depend on the

strength of their claims and the size of the expected recovery as well as the complexity (and thus cost) of the claim in question.

**d. Control of funders (Courts/Legislators/Self-regulation)**

There is no legislative or public administrative control of funders in the UK. However, through the common law torts of maintenance and champerty, anyone who improperly funds the litigation of another may be found liable for all of the (adverse) costs of that litigation if the case is lost. This possibility has been relaxed for *bona fide* commercial litigation funders through the practice of the English courts: funders now are normally able to limit their liability to a specific amount. However, the courts retain a reserve power to waive this protection if the funders act improperly.

In addition, a self-regulatory group, the Association of Litigation Funders (ALF) has produced a Code of Practice which is used as a guide by the courts (and others) as to acceptable funding practices. This combination of self-regulation with court oversight has to date proven sufficient to control the litigation funding sector.

**e. Claimant-Funder relationship**

Both the case-law based practice on maintenance and champerty and the ALF code of practice emphasise that the funder should not influence the course of the litigation — which should be left to the client (group) as advised by their legal representative. It is, however, common for funding agreements to require the funder to be kept informed — for example of offers to settle — during the course of the litigation.

**7. Enforcement of collective actions/settlements**

**a. Framework for enforcement**

The general enforcement provisions of the CPR (rule 70) apply to orders and judgments made following the general collective redress procedures described there. There are no special rules for executing judgments against participants in a GLO action. In a representative action, however, no order or judgment may be enforced by or against a person being represented (who is not a party) without the consent of the court (CPR 19.6(4)(b)).

**b. Efficient enforcement of compensatory/ injunctive order**

See above. Refusal to comply with an injunction or similar order — which is endorsed with a 'penal notice' (a warning that non-compliance is a criminal offence) — may be enforced through contempt of court proceedings. A court may make an order committing the defaulter to prison or may impose a lesser sanction — a fine or sequestration of goods, for example.

**c. Cross border enforcement**

CPR 74 provides detailed rules for the enforcement of orders under the Brussels Regulation (1215/12) and of European Enforcement Orders (EC 805/2004). These apply to the enforcement of judgments in collective redress claims as they do to other claims.

## **8. Number and types of cases brought/pending**

In the period 2000 – January 2017, 98 GLOs were made in all kinds of claims.<sup>766</sup> There are no reliable statistics for representative or test claims for collective redress since these mechanisms are not restricted to collective redress cases.

## **9. Impact of the Recommendation/Problems and Critiques, including**

### **a. No collective redress mechanism**

The general collective redress mechanisms identified above were introduced before the Recommendation was made in June 2013 and so the general impact of the Recommendation is difficult to establish. The competition collective proceedings order — introduced from October 2015 — follows closely the provisions of the Recommendation. In particular, the requirements under the collective proceedings rules (see below), for the Competition Appeal Tribunal to decide whether to make an ‘opt-in’ or ‘opt-out’ CPO, appear to implement the requirements of paragraph 21 of the Recommendation — opt-in should be the starting point with opt-out being made available if necessary in the interests of justice.

### **b. Impact of the collective mechanism (or lack of) on behaviour/policy of stakeholders (direct/ indirect, economic/social impact)**

As noted, the general collective redress mechanisms in the UK were not made as a consequence of the Recommendation and therefore any assessment of the Recommendation’s impact at a general policy level is necessarily anecdotal. However, the public debate on the merits (or otherwise) of various forms of collective redress through the courts continues to be a lively one.

The competition collective proceedings mechanism introduced in late 2015 is at present too new to have had a substantial impact on behaviour. This situation is likely to change as the practice of the CAT in making CPOs (in particular on an opt-out basis) becomes clearer through its decisional practice.

### **c. Incompatibilities with the Recommendation’s principles**

The UK civil procedure rules are broadly in conformity with the Recommendation. The UK has an opt-in collective redress mechanism (the GLO) generally available for victims of a mass harm to claim compensation. The use of declaratory relief has an equivalent effect as a general ‘collective injunction’. There are also more developed forms of collective redress in the competition and consumer law fields.

### **d. Short summary of all identified incompatibilities**

(1) The UK courts do not have

(1.1) a generally available opt-out compensatory collective redress mechanism for use where it is in the interests of the sound administration of justice for collective redress actions to proceed in that way; nor

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<sup>766</sup> they are listed at <https://www.gov.uk/guidance/group-litigation-orders>

(1.2) a generally available representative compensatory collective redress procedure for groups of victims of a mass harm event where the victims' claims are similar or related, but not the "same" (identical), to each other.

The mechanisms available for these types of situation only apply to competition law claims.

(2) There is no requirement that the representative in the current English representative proceedings (CPR 19.6) should have a non-profit motive. Indeed, the requirement that he has the same interest in the claim as the persons represented implies that he too must have a pecuniary interest.

(3) There is no legislative nor public administrative supervision of private litigation funding in the UK. Lawyers' remuneration (which may in practice fulfil the same function) are however regulated by legislation as well as by the courts.

(4) There is no express provision for the court to approve settlements of claims raising common issues under the GLO procedure. However, since the GLO proceedings are 'opt-in' only, any claimant who does not wish to be bound by the settlement may continue his action individually. If sufficient claimants reject the settlement and continue their claims, it is probable that the GLO proceedings will also continue without the settling claimants. Settlements of competition collective proceedings must be approved by the CAT.

(5) There is no express legislative provision for a representative entity recognised by the authorities of another Member State automatically to have standing in collective redress actions in the courts in the UK. However, the English courts have wide case management powers such that they would (where necessary) be able to admit a collective claim as a GLO organised by a foreign authorised body if it is in the interests of justice to do so.

### **Problems relating to access of justice/fairness of proceedings**

The extent of any problems relating to access to civil justice in the UK varies according both to the type of claimant and the type of claim. For business – including most SMEs – it is likely that existing mechanisms (the GLO for example) are sufficient to enable them to bring or participate in a collective redress action if they have suffered loss as a result of a mass harm event caused by a breach of directly effective EU law.

For individuals and micro businesses, it appears that the situation is more complex and depends on the type of claim: for example

- consumers who have claims against financial services providers may make claims to the Financial Services Ombudsman who has statutory powers to require financial institutions to compensate for breaches of (among others) EU financial services law – an effective form of non-contentious collective redress;
- individuals harmed by mass product defects (e.g. in breast implants) have used the GLO procedure ([ref the PIP case])
- certain sectors offer consumer ombudsmen schemes to resolve disputes. Traders in these sectors may either belong to an ombudsman scheme voluntarily (e.g. the Property Ombudsman Scheme for estate agents) or be required to participate by legislation (e.g. the Legal Ombudsman for solicitors and other legal services providers);

- most straightforward claims for money compensation may now be made on-line and, for small claims (maximum £10,000) the 'loser pays' rule does not apply. As legal advice is not mandatory, consumers are able to make individual claims relatively quickly and economically.

Clear examples of 'abusive litigation' on a collective basis, based on directly effective EU law, are rare and depend on the definition of 'abusive' used. As a recent example, in the competition law claims against various air cargo carriers following on from the Commission decision of December 2010 finding a cartel in air freight surcharges, a law firm was censured by the court for having brought a claim on behalf of 60,000 Chinese claimants who, it later emerged, had not properly consented to being claimants (ref [Baoziang]). However, as most collective claims are brought for personal injury caused by mass harm events (so outside the scope of EU law), cases of abuse in litigation linked to the Recommendation are currently unlikely.

## II. Competition and consumer collective redress

### A. Competition collective proceedings orders

#### 1. Scope

The Competition Act 1998 s 47B-E provides an alternative means of collective redress (in addition to the general procedures - above) for claimants to bring collective claims in competition cases. These provisions were inserted in the Competition Act by Schedule 8 of the Consumer Rights Act 2015 and came into force on 1 October 2015.<sup>767</sup>

The 'collective proceedings' mechanism permits a proposed representative claimant to make an application to the UK Competition Appeal Tribunal (CAT) for a collective proceedings order. The representative's application must allege a breach of either EU competition law (Articles 101 or 102 TFEU) or of the UK equivalents (in chapters I and II of the Competition Act 1998).

The remedy applied for in the CPO application may be either compensation and/or an injunction requiring the infringing activity to cease.

It is not a pre-requisite for a CPO application that a public authority should have first made an infringement decision, although both of the applications made (to mid 2017) have followed on from a competition authority decision.

The CPO may be made either on an opt-in basis — so that the proceedings will bind all persons who adhere to it — or on an opt-out basis — the proceedings bind all person resident in the UK who are within the class unless they choose not to be part of the proceedings.

In addition to making a collective proceedings order the CAT also has the power to make a collective settlement order (under section 49A-B of the Competition Act 1998) if a settlement between one or more defendants and a proposed representative claimant has already been reached. The order can approve the settlement both where there are on-going collective proceedings and where collective proceedings have yet to be begun. In addition to the

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<sup>767</sup> commencement order SI 2015/1630 at: [http://www.legislation.gov.uk/uksi/2015/1630/pdfs/uksi\\_20151630\\_en.pdf](http://www.legislation.gov.uk/uksi/2015/1630/pdfs/uksi_20151630_en.pdf) )

requirements for a collective proceedings order, the CAT must also consider that the terms of the settlement are just and reasonable before approving it. An approved settlement is binding on all members of the class in the UK unless they opt-out within the time limit set by the CAT.

The new procedures replace the section 47B representative action originally provided in the 1998 Act, which allowed designated bodies to bring claims for damages on behalf of consumers against an infringing undertaking following an infringement finding by a competition authority. Only one action was brought under the previous s 47B procedure — following on from the OFT's decision in 'replica football kit' — and it was not generally viewed as a success.

## **2. Procedural Framework**

The procedural framework for competition collective proceedings is set out in the Competition Act 1998 (as amended by the Consumer Rights Act 2015), the CAT Rules (made in the form of delegated legislation) and the CAT 'Guide to Proceedings' dating also from 2015.

### **a. Competent Court**

Although competition actions may be commenced in any civil court in UK, only the CAT is able to make a collective proceedings order (CPO) or collective settlement order (CSO). There is provision for competition cases to be transferred to the CAT from other court if the parties apply for this.

### **b. Standing**

Paragraph 78 of the CAT Rules 2015 sets out a number of requirements regarding the standing of the class representative. The class representative may — but need not— be a member of the class. This leaves open the possibility of an 'ideological' claimant (a consumer body for example) being authorised to act as the class representative.

In all cases, it must be "just and reasonable" for the applicant to act as a class representative in the collective proceedings. The purpose of this assessment is to ensure that class members are fairly and adequately represented. This is particularly important in the case of opt-out proceedings where there may not be as much contact between the class representative, its lawyers and the members of the class.

The CAT must consider whether the proposed representative would in all the circumstances fairly and adequately act in the interests of class members, and in particular

- is he a member of the class and, if so, is he suitable to manage the proceedings?
- if not a member of the class, is the proposed representative a pre-existing body (and what are its nature and functions)?
- is there a satisfactory plan for conducting the collective proceedings which includes
  - o a method of notifying the class members of progress,
  - o a governance and consultation procedure for the class; and

- a budget or estimate of the costs and fees of pursuing the proceedings?

Where there are class members whose claims raise certain common issues not shared by the whole class, the CAT may authorise a person to act as the class representative for a sub-class in relation to those separate common issues.

### **c. Availability of Cross Border collective redress**

Any victim of a competition law infringement may opt-in to a UK collective competition proceeding regardless of nationality or residence. However, an opt-out CPO order will only bind those class members who have not opted out and who are domiciled in the UK at the time set out in the order. However, even in an opt-out proceeding, non-UK residents may nevertheless decide to opt in.

### **d. Opt In/ Opt Out**

#### **Principal availability of both options**

The CAT has the power to make a CPO on either an opt-in or an opt-out basis. In contrast, a CSO can only be made on an opt-out basis — that is, it will bind all persons domiciled in the UK unless they opt-out within the time set by the CAT in its CSO decision.

#### **Conditions for either type (prescribed by law or discretion of the judge)**

The CAT will primarily consider two criteria in determining whether the proceedings should be opt-in or opt-out (Rule 79(3)):

##### ***Strength of the claims***

The CAT will require the strength of an opt-out claim to be more immediately perceptible than an opt-in case since, in opt-in claims, group members may conduct their own individual assessments as to the strength of the claim before joining. However, this criterion does not require the CAT to conduct a full merits assessment nor does it expect parties to make detailed submissions on their claim at the time of application for the CPO.

##### ***The practicality of the proceedings being brought as opt-in proceedings:***

In determining the practicalities of an opt-in proceeding, the Tribunal will consider all the circumstances, including the estimated amount of damages that individual class members may recover. The Tribunal has a general preference for proceedings to be opt-in where practicable, since the class is usually smaller and the members are easier to identify and contact.

#### **Opt-Out restricted to In-jurisdiction claimants?**

If the CAT makes an opt-out CPO or a CSO, the 'opt-out' effect will only preclude further action by class members domiciled in the UK on the date given for this purpose in the CAT's order.

## **Opt-out justified by the sound administration of justice?**

Before the CAT makes an opt-out CPO, the CAT must consider that the claims are *prima facie* both sufficiently robust to proceed as opt-out proceedings and that an opt-in order would not be adequate to manage the case properly.

### **e. Main procedural rules**

#### **Admissibility and certification criteria**

A representative may bring a collective proceedings application where the class comprises two or more competition claims raising the same, similar or related issues of fact or law and which are suitable for inclusion in collective proceedings (Competition Act 1998, s. 47B(6)).

Where a representative makes an application to the CAT for a collective proceedings order, the CAT must consider whether the proposed representative should be authorised (see above). The CAT Rules require that CAT must also satisfy itself that the claims for which collective treatment is requested are eligible for inclusion in collective proceedings.

There are three requirements in determining the eligibility of the claims (as set out in Rule 79(1)):

1. the claims must be brought on behalf of an identifiable class of persons;
2. the claims to be included in the proceedings must raise "common issues"; and
3. the claims must be "suitable" to be brought in collective proceedings.

When it considers the 'suitability' criterion, the CAT will take into account (Rule 79(2)):

- whether collective proceedings are appropriate for the fair and efficient resolution of the common issues;
- the costs and the benefits of commencing and continuing the collective proceedings;
- if any similar claims by class members have already been commenced;
- the size and composition of the class
- how easy it is to decide who is and is not in the class;
- if the claims can be compensated by an aggregate award of damages;
- whether the proceedings could be better dealt with through ADR.

#### **Single or Multi-stage process**

Making a CPO is a multi-stage process. In contrast, making a CSO is a single stage process.

At the first stage of the CPO procedure, the CAT has discretion to grant a collective proceedings order on the basis of the criteria set out above: if it does so, the order must include

- authorisation of the person who brought the proceedings to act as the representative in those proceedings;
- description of the class of persons whose claims are eligible for inclusion in the proceedings, and
- specification of the proceedings as opt-in collective proceedings or opt-out collective proceedings (see subsections (10) and (1))



## **Case-Management and deadlines**

The CAT rules — which are similar but not identical to the CPR — contain a set of special additional rules for collective proceedings cases (part 6). In particular:

- the Tribunal will hold a case management conference as soon as possible after an application for a CPO has been made — and therefore before the statement of case or defence have been filed. At this CMC, the CAT will (if it considers the requirements are met) authorise the representative and certify the class;
- the initial case timetable will also be set at the first CMC;
- the CAT will also need to consider whether the proceedings should be opt-in or opt-out at this time;
- a further CMC will be held after the CPO has been made to deal with management issues such as the timetable for filing the defence(s), disclosure of documents (including, if necessary documents held by non-parties) and whether the case should be 'fast-tracked'.

## **Expediency (particularly in injunctive cases)**

The CAT is able to make interim injunctions in a comparable way to the High Court (see above).

## **Evidence/discovery rules**

- Unlike in normal civil proceedings, the CAT rules do not allow for 'automatic' discovery by list of documents. The CAT will consider what orders for discovery should be made at the first CMC (after the CPO has been made) and how discovery should be organised — for example through keyword searches in electronic data;
- Findings of fact in decisions made by the UK Competition and Markets Authority (CMA) and all infringement decisions of the CMA or the European Commission are — after the expiry of any relevant appeal period — binding on the CAT (or the court) if a claim is brought following on from the infringement decision or where other decisions are relevant to the claims being made.
- Final infringement decisions of other competition authorities in the EU are prima facie evidence that the infringement described in them has taken place.

## **Court directed settlement option during procedure**

The CAT may refuse to make a CPO if it thinks that the dispute could better be resolved using a form of ADR. This includes the possibility of applying to the CMA for the approval of a voluntary redress scheme instead of litigating in the CAT under a CPO.

The use of settlement offers also differs slightly in the CAT from general civil procedure rules. CAT Rule 45 allows both defendants and claimants (including representative claimants) to make pre-trial offers to settle the claim. Where the offer is not accepted, it is not disclosed to the CAT. If, after trial, the judgment given is not more advantageous than the offer made, the party refusing to accept the offer suffers consequences in costs.

If it is the claimant who refuses the defendant's offer, the claimants must pay the defendant's costs, even though the defendant may be liable to pay

damages to the claimants. If the defendant has refused to accept a claimant offer, not only will the claimants receive an enhanced amount of interest on the compensation awarded (to a maximum of base rate + 10%) but also an automatic uplift of 5-10% of the damages awarded. These provisions are clearly intended to incentivise parties to accept reasonable offers to settle.

### **3. Available Remedies**

#### **a. Type of damages**

Damages (to put the claimants in the position they would have been in had the event causing mass harm not occurred) are the main remedy available to the CAT in CPPO proceedings. In contrast to general forms of collective redress the CAT may not make an award of exemplary (punitive) damages under a CPO. However, if it has made a CPO, the CAT is not required to assess individually the damages for each class members: it is entitled to make an aggregate assessment.

#### **b. Allocation of damages between claimants for compensatory claims**

The CAT requires the applicant for a CPO to have a plan for managing the collective proceedings before it makes a CPO. One of the requirements for such a plan to be acceptable is that it should set out how any aggregated damages awarded to the class will be distributed among the class members.

#### **c. Availability of punitive or extra-compensatory damages and their conditions**

None

### **4. Costs**

#### **a. Basic rules governing costs and scope of the rules**

Although the CAT in practice tends to follow the general rules on costs in the CPR, it is not required to do so. Its rules give it a wide discretion as to how to allocate costs of any collective proceeding as between the parties.

#### **b. Loser Pays Principle**

In general the CAT has followed the basic principle that the 'loser pays' the costs of litigation. However, it is not required to do so, and, as noted above, the effect of a settlement offer may also differ from the standard CPR rules — encouraging parties to settle competition claims early.

### **5. Lawyers' Fees**

In contrast to general civil litigation (including non CPO competition claims), DBAs (contingency fees) are not available in opt-out CPO proceedings. However, there would appear to be nothing to prevent them being used either in opt-in CPO proceedings nor in a settlement leading to a CSO (although clearly the CAT will need to be persuaded that the fee arrangements are just and reasonable).

## **6. Funding**

Funding for collective proceedings in the CAT may be funded by litigation funders – the comments above at section II apply.

## **7. Enforcement of collective actions/settlements**

Judgements of the CAT are treated as if they were judgments of the High Court for enforcement purposes.

## **8. Number and types of cases brought/pending**

Two applications have been made for a CPO to date (mid 2017): both applications related to follow-on claims from decisions of (respectively) the OFT (now CMA) and the European Commission. In the first, damages were claimed on behalf of a class of persons said to be harmed by an infringement of the Competition Act restricting retailers' resale pricing of mobility scooters. This application has now been withdrawn (25 May 2017). The second application is a collective claim on behalf of a class of consumers said to have been harmed by overcharging from Mastercard following on from the European Commission's decision of December 2007. The application for the CPO has been heard, but not yet decided.

## **9. Impact of the Recommendation/Problems and Critiques, including**

See comments at section II above

## **B. Consumer enforcement orders**

### **1. Scope**

The general methods of collective redress described above have been used extensively in a consumer law context - with the exception of the general representative action (CPR 19.6), which is not suitable for this kind of claim due to the narrowness of its scope of application.

In addition, Part 8 of the Enterprise Act 2002 gives designated enforcers the power to apply to the court for orders preventing breaches of both domestic and Community consumer legislation in the UK. The scope of the order that the court may make is not specified on the face of the statute, although it must relate to the 'conduct' of the business, but orders appear generally to be limited to requiring the business against whom the order is made to cease the unlawful conduct described in the order.

The Consumer Rights Act came into force on 1 October 2015. All consumer purchases from this date onwards will be governed by this legislation. It amends the powers of some consumer enforcement bodies and gives greater rights to consumers.

Schedule 7 CRA amends Part 8 of the Enterprise Act in order to broaden the scope of redress available to consumer enforcers to include compensation and not solely injunctive relief. This is part of the "enhanced consumer measures"

(ECMs) introduced by CRA 2015. ECMs are designed to allow enforcers to achieve the best outcomes for consumers. Guidance provided by BIS states that the measures must aim to achieve one or more of the following outcomes:

- a) Redress for consumers
- b) Information — enabling consumer choice
- c) Compliance — reduction in reoffending.

## **2. Procedural Framework**

### **a. Competent Court**

An application under Part 8 must be brought in the High Court.

### **b. Standing**

Only those public bodies either set out in the Enterprise Act itself (the OFT, Trading Standards Offices - run by local authorities - and certain public consumer protection or regulatory bodies) or a private body designated by the minister may apply for a Part 8 order. To date the only non-public body to be designated is the Consumers' Association (Which?). Previously, other private bodies were not entitled to make orders, however Sch 7 para 4 has specifically introduced a new category of private body under the Communications Act 2003 in order to regulate premium rate callers. Sch 7 does not contain a specific list of designated private bodies but it is likely that as cases are brought under the amendment new bodies will apply to the Secretary of State to become designated.

While both public and private bodies are able to bring a claim forward under Part 8 EA 2002, individual consumers are not able to do so. They must refer their complaints to one of the designated bodies.

### **c. Availability of Cross Border collective redress**

Foreign claimants have no standing to bring an application under Part 8 as they are not specified in the Act, nor have any non-UK bodies been designated by the Minister.

### **d. Court directed settlement option during procedure**

The general civil procedure rules apply to applications for consumer measures under Pt 8 Enterprise Act (as amended)

The Part 8 procedure used to be a purely injunctive procedure. However, since the enactment of Sch 7 CRA 2015, enforcers are now able to claim compensation under "enhanced consumer measures"

Part 8 sets out the steps to be followed before an application may be made: the enforcer must first consult both the business thought to be infringing consumer law and the OFT.

The business also has the opportunity to offer undertakings to address the enforcer's concerns. If an undertaking is given, an application for an order may not then be made, but breach of the undertaking will allow an enforcer to make a court application for an order sanctioning the breach.

In urgent cases, the enforcer may apply to the court for an interim order under part 8 even without giving notice to the business concerned - although the business may apply to the court to have the interim order set aside once it has been brought to its attention.

Prior to the amendments made by Sch 7 the only actions that could be taken against infringers were criminal prosecution or civil action to stop the infringing behaviour. How far ECMs are used is the decision of the enforcer, but generally they can only be used where consumers have suffered loss. There is no minimum or maximum level of individual loss that precludes the use of the measures. They can also be used in conjunction with either a criminal or other civil action.

The process by which ECMs are enforced begins with an attempt to settle by agreement with the infringer. An undertaking is sought from the trader that the measures will be put in place. However, if the infringer refuses to implement the measures, then the case will go to court as a civil action for the courts to decide if the measures are just, reasonable and proportionate.

The enforcer's job continues after the ECMs are implemented, they must ensure on-going compliance and that the consumers are receiving redress.

ECMs can be used to seek measures in the "collective interest of consumers". This is a situation where the business has caused loss but is unable to identify some/all of the consumers affected. Enforcers in these circumstances can require that the business pay the equivalent of the loss suffered to a consumer charity, for example Citizens Advice Service.

### **3. Available Remedies**

Remedies under a Part 8 order were limited to requiring the business subject to the order not to continue or repeat the conduct or connive in such conduct when carried on by others (an injunction) There is now statutory power to require an award of compensation under 'enhanced consumer measures'. Sch 7 of CRA 2015 introduced some key changes as to the remedies available to claimants. While the legislation itself does not contain a list of possible measures, several were included in the preceding government consultation. Below is a summary of potential remedies included in the later BIS (UK government) Guidance on ECMs:

- setting up a redress scheme and notifying it to customers
- appointing a compliance officer
- signing up to a certified ADR or similar scheme and committing to be bound by its decisions
- detailing their breach and what they are doing to put it right — on their website or through a press release

Money redress may be ordered where consumers have suffered loss. An enforcement order may include enhanced consumer measures in the redress category only in a "loss case" and only if the court/enforcer is satisfied that the costs of enforcement are unlikely to be more than the sum of losses suffered by consumers as a result of the conduct. Measures in the redress category are:

- measures offering compensation or other redress to consumers who have suffered a loss as a result of the conduct which has given rise to the enforcement order or undertaking,

- offering consumers the option to terminate (but not vary) the purchase contract,
- where such consumers cannot be identified (or cannot be identified without disproportionate cost), measures intended to be in the collective interest of consumers

Here it is clear that the variety of remedies available under an enforcement order (brought by public bodies) go above and beyond previous injunctive relief not only to benefit potential claimants but to improve compliance with consumer law and discourage the repetition of conduct specified in the order.

Where private bodies apply for ECMs, two additional conditions need to be satisfied:

- the enforcer is specified for the purpose by order made by the Secretary of State.; and
- the ECMs do not directly benefit the enforcer or an associated undertaking.

#### **4. Costs**

##### **a. Basic rules governing costs and scope of the rules**

##### **b. Loser Pays Principle**

The rules on costs in the CPR will apply to Part 8 applications.

#### **5. Lawyers' Fees**

DBAs are available to both the enforcer and the defendant, although it is unlikely that public enforcers will make substantial use of them.

#### **6. Funding**

See section II above

#### **7. Enforcement of collective actions/settlements**

See section II above

#### **8. Number and types of cases brought/pending**

#### **9. Impact of the Recommendation/Problems and Critiques, including**

See section II above

### **III. Information on Collective Redress**

#### **1. National Registry**

The national GLO list can be accessed at <https://www.gov.uk/guidance/group-litigation-orders>

Information in applications for competition CPOs is on the CAT website: <http://www.catribunal.org.uk> although CPO applications are not at present listed separately.

#### **2. Channels for dissemination of information on collective claims**

Various privately run websites offer information on collective redress.

### **IV. Case summaries in table format (ie taking into account data collated by the Commission) including**

The current GLO list is available at the address noted above. The two CPO applications made to date are at a very early stage — and one has been withdrawn — see section III A 8. No CPO disputes have resulted in compensation paid nor have the disputes been resolved.

# COUNTRY REPORTS ANNEX

## AUSTRIA

### 1. Legislation

#### § 11 ZPO

Link:

<https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR12020142&ResultFunctionToken=bc6761a0-c109-4e28-b22c-cd85d061123c&Position=1&Kundmachungsorgan=&Index=&Titel=ZPO&Gesetzesnummer=&VonArtikel=&BisArtikel=&VonParagraf=11&BisParagraf=&VonAnlage=&BisAnlage=&Typ=&Kundmachungsnummer=&Unterzeichnungsdatum=&FassungVom=26.04.2013&NormabschnittnummerKombination=Und&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=>

#### § 227 ZPO

Link:

<https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR12020361&ResultFunctionToken=df1945fb-7fde-45a4-abad-bda769204aee&Position=1&Kundmachungsorgan=&Index=&Titel=ZPO&Gesetzesnummer=&VonArtikel=&BisArtikel=&VonParagraf=227&BisParagraf=&VonAnlage=&BisAnlage=&Typ=&Kundmachungsnummer=&Unterzeichnungsdatum=&FassungVom=26.04.2013&NormabschnittnummerKombination=Und&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=>

#### § 502 ZPO

Link:

<https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR40106071&ResultFunctionToken=2d146d38-37bf-4aed-8623-d0998d39e966&Position=1&Kundmachungsorgan=&Index=&Titel=ZPO&Gesetzesnummer=&VonArtikel=&BisArtikel=&VonParagraf=502&BisParagraf=&VonAnlage=&BisAnlage=&Typ=&Kundmachungsnummer=&Unterzeichnungsdatum=&FassungVom=26.04.2013&NormabschnittnummerKombination=Und&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=>

§ 29 KSchG Konsumentenschutzgesetz (Consumer Protection Act), implementing the Injunction Directive)

Link: <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR12041214&ResultFunctionToken=c59903b2-73ad-4304-8351-0a7f5b88ed05&Position=1&Kundmachungsorgan=&Index=&Titel=KSchG&Gesetzesnummer=&VonArtikel=&BisArtikel=&VonParagraf=29&BisParagraf=&VonAnlage=&BisAnlage=&Typ=&Kundmachungsnummer=&Unterzeichnungsdatum=&FassungVom=26.04.2013&NormabschnittnummerKombination=Und&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=>



## **2. Other relevant materials**

### **a. Draft for New Group Proceeding**

See, in this regard, also chapter III. 8. Above.

Link:

[https://www.parlament.gv.at/PAKT/VHG/XXIII/ME/ME\\_00070/](https://www.parlament.gv.at/PAKT/VHG/XXIII/ME/ME_00070/)

### **b. Country reports**

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There are no plans/draft mechanisms in this field. Developments in the Italian legal landscape are occurring in other fields, such as public enforcement and ADR.

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# LITHUANIA

## 1. Legislation

### a. General

Article 49 and Chapter 24/1 of the Civil Procedure Code

The Order of the Ministry of Justice No 1R-378, 2014-12-22

### b. Sectoral

#### Consumer Law

Chapter 7 of the Law on Consumer Protection

#### Competition Law

Article 16 and Articles 43-53 of the Law on Competition

#### Environmental Law

Article 7 of the Law on Environmental Protection

The legal acts are available on the internet site - <https://www.e-tar.lt/portal/index.html>.

## 2. Other relevant materials

### a. Country reports

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12. Mikelėnas V. Tarptautinės privatinės teisės įvadas. Vilnius: Justitia, 2001
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14. Nekrošius V., Simaitis R., Vėbraitė V., Brazdeikis A. Grupės ieškinys kaip civilinio proceso spartinimo priemonė. Teisė, 2016, Nr. 98
15. Bublienė D. Recent Collective Redress Developments in Lithuania – Key Issues in Light of the Implementation of the Commission Recommendation in ed. Eva Iain, Duncan Fairgrieve, Marta Otero Crespo, Vincent Smith. Collective Redress in Europe – Why and How. BIICL, 2015

### **c. Consultations**

Applied scientific research ordered by the Ministry of Justice "Regulatory analysis of group action and proposals for the improvement of this institute", Lithuania, Vilnius, 2008



# LUXEMBOURG

## 1. Legislation

Articles 50 and 206 Nouveau Code de la Procédure Civile

Articles L.212-11, L.311-3, L.313-1, L.320-3 Code de la Consommation

Articles 23 and 25 of the Law of 30 July 2002

## 2. Other relevant materials

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Ashurst study, National report for Luxembourg – available <http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>

# MALTA

## Legislation

The Collective Proceedings Act, 2012 - Consumer Protection

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# THE NETHERLANDS

## 1. Country reports

Class Actions in the Netherlands - Ianika Tzankova

<http://globalclassactions.stanford.edu/content/class-actions-netherlands>

Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union - Country report The Netherlands - Prof. Dr. M.B.M. Loos, University of Amsterdam

Dr. Ralf Alleweldt, University Viadrina Frankurt (Oder) - (18 July 2008)

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2. M-J. van der Heijden, 'Class Actions/les actions collectives', *Electronic Journal of Comparative Law*, vol. 14.3 (December 2010), <http://www.ejcl.org>, <http://www.ejcl.org/143/art143-18.pdf>

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2. N. Frenk, 'Bundeling van vorderingen', *Tijdschrift voor privaatrecht* 2003, p. 1413-1488.
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3. B. Wessels, 'Collectieve preventieve rechterlijke toetsing', chapter 18, p. 379-392 in: B. Wessels, R.H.C. Jongeneel, M.L. Hendrikse, *Algemene voorwaarden*, Deventer: Kluwer 2010.

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2. J.W. van de Gronden, 'Het mededingingsrecht en de consument', in: E.H. Hondius and G.J. Rijken (ed.), *Handboek Consumentenrecht*, 3rd ed., Zutphen: Paris 2011, chapter 19, p. 459-489

### **Financial Market Law**

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2. I. Tzankova and J. Kortmann, 'Remedies for consumers of financial services: collective redress and improvement of class representation', *European journal of consumer law* 2010(1), p. 117-141.
3. J.H. Lemstra and V.M. Neering, 'Civielrechtelijke handhaving', in: D. Busch and C.M. Grundmann-van de Krol, *Handboek beleggingsondernemingen*, Kluwer: Deventer 2009, p. 1045-1084.
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Act on the Protection of Competition and Consumers of 16 February 2007, as amended, published on 26 January 2017 (published in Dziennik Ustaw of 2017, item 229) <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20170000229>

## 2. Other relevant materials

The Code of Civil Procedure (Act of 17 November 1964, the most current text available in Dziennik Ustaw of 15 February 2017, <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19640430296>)

M. Niedużak, M. Szwał, *Pozwy grupowe - doświadczenia po czterech latach*, Helsińska Fundacja Praw Człowieka, Warszawa, lipiec 2014, p. 16, <http://programy.hfhr.pl/monitoringprocesulegislacyjnego/files/2014/08/Pozwy-grupowe02.pdf>

Marek Radwański "Powiatowy (miejski) rzecznik konsumentów w postępowaniu cywilnym" (regional (town) consumer ombudsman in civil proceedings), 2012 Biuletyn Rzeczników Konsumentów, No. 1, pp. 4 – 8, [http://www.rzecznicy.konsumentow.eu/biuletyny/Biuletyn\\_rzecznikow\\_nr\\_1\\_2012.pdf](http://www.rzecznicy.konsumentow.eu/biuletyny/Biuletyn_rzecznikow_nr_1_2012.pdf)

W. Ostaszewski, Rzeczpospolita, December 5, 2012 "Poszkodowani w wypadku przy pracy mogą wystąpić z pozwem zbiorowym" (those injured in the workplace can bring a class action) <http://prawo.rp.pl/artukul/792854,958037-Poszkodowani-w-wypadku-przy-pracy-moga-wystapic-z-pozwem-zbiorowym.html>

Gazeta Wyborcza, 31 August 2012, "Do gdańskiego sądu wpłynął pozew zbiorowy przeciwko Amber Gold", [http://wyborcza.biz/finanse/1,105684,12400194,Do\\_gdanskiego\\_sadu\\_wplynal\\_pozew\\_zbiorowy\\_przeciwko.html](http://wyborcza.biz/finanse/1,105684,12400194,Do_gdanskiego_sadu_wplynal_pozew_zbiorowy_przeciwko.html)).

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# PORTUGAL

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[http://globalclassactions.stanford.edu/sites/default/files/documents/Portugal\\_National\\_Report.pdf](http://globalclassactions.stanford.edu/sites/default/files/documents/Portugal_National_Report.pdf)

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<http://www.iclg.co.uk/practice-areas/class-and-group-actions/class-&-group-actions-2013/portugal>



# ROMANIA

## 1. Legislation

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Law 193/2000 - <http://legeaz.net/legea-193-2000-clauze-abuzive-comercianti/>

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## 2. Other relevant materials

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<https://studia.law.ubbcluj.ro/articol/660>

<https://www.juridice.ro/326335/clauzele-abuzive-in-contractele-de-credit-o-tema-incandescenta-in-dreptul-national-si-cel-european.html>

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# SLOVAK REPUBLIC

## 1. Legislation

The acts in Slovak language are available at: <https://www.slov-lex.sk/web/en> (Legislative and Information Portal Slov-Lex) and also on unofficial portal <http://www.zakonypreludi.sk/> (there is no official translation of Slovak legislation)

## 2. Other relevant materials

Collection of Papers from the International Academic Conference Bratislava Forum 2016 - Collective Redress (in Slovak and Czech language) is available at:  
[http://www.lawconference.sk/zborniky/bpf/Zborn%C3%ADk\\_BPF2016\\_sekcia\\_07.pdf](http://www.lawconference.sk/zborniky/bpf/Zborn%C3%ADk_BPF2016_sekcia_07.pdf)

Special issue of journal Acta Iuridica Olomucensia on collective redress (also in Czech and Slovak language): [http://acta.upol.cz/wp-content/uploads/2016/06/AIO\\_1\\_2016\\_7.pdf](http://acta.upol.cz/wp-content/uploads/2016/06/AIO_1_2016_7.pdf)

<http://www.zakonypreludi.sk/>

[http://acta.upol.cz/wp-content/uploads/2016/06/AIO\\_1\\_2016\\_7.pdf](http://acta.upol.cz/wp-content/uploads/2016/06/AIO_1_2016_7.pdf)

# SLOVENIA

## 1. Legislation

Slovenian Consumer Protection Act (Zakon o varstvu potrošnikov):  
<http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO513> (22 May 2017),

Proposal for a Collective Redress Act of 18 May 2017:  
[http://www.mp.gov.si/fileadmin/mp.gov.si/pageuploads/mp.gov.si/novice/2017/april\\_2017/maj\\_2017/ZKolT\\_VG1.pdf](http://www.mp.gov.si/fileadmin/mp.gov.si/pageuploads/mp.gov.si/novice/2017/april_2017/maj_2017/ZKolT_VG1.pdf) (22 May 2017).

## 2. Other relevant materials

Galič, Aleš: Skupinske tožbe na področju potrošniškega prava, Pravni letopis, 2011, pp. 215-229;

Damjan, Matija: Množični zahtevki zaradi posegov v zdravo življenjsko okolje, Pravni letopis, 2011, pp. 243-270.

# SPAIN

## 1. Legislation

Act 1/1996, of 10 January, on Free Legal Assistance:  
<https://www.boe.es/buscar/act.php?id=BOE-A-1996-750> (in Spanish)

Act 15/ 2007, of 3 July, on the Protection of Competition:  
<https://www.boe.es/buscar/act.php?id=BOE-A-2007-12946> (in Spanish)

Act 16/2011, of 24 June, on Consumer Credit Contracts:  
<https://www.boe.es/buscar/act.php?id=BOE-A-2011-10970> (in Spanish)

Act 26/2007, of 23 October, on Environmental Liability:  
<https://www.boe.es/buscar/act.php?id=BOE-A-2007-18475> (in Spanish)

Act 3/ 1991, of 10 January, on Unfair Competition (UCA):  
[https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.country.vie\\_wFile&lawID=29&languageID=EN](https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.country.vie_wFile&lawID=29&languageID=EN)

Act 34/1988, of 11 November, on Advertising:  
<https://www.boe.es/buscar/act.php?id=BOE-A-1988-26156> (in Spanish)

Act 36/2011, of 10 October, on Social Jurisdiction Proceedings:  
<https://www.boe.es/buscar/act.php?id=BOE-A-2011-15936> (in Spanish)

Act 39/2015, of 1 October, on Contentious Proceedings:  
<https://www.boe.es/buscar/pdf/2015/BOE-A-2015-10565-consolidado.pdf> (in Spanish)

Act 7/1998, of 13 April, on Standard Form Contracts:  
<https://www.boe.es/buscar/act.php?id=BOE-A-1998-8789> (in Spanish)

Civil Code (CC): <https://boe.es/buscar/act.php?id=BOE-A-1889-4763&p=20151006&tn=2> (in Spanish)

Code of civil procedure, Act 1/2000, of 7 January, on Civil Procedure (CCP):  
<https://www.boe.es/buscar/act.php?id=BOE-A-2000-323> (in Spanish)

Organic Law 6/1985, of 1 July, of the Judicial Power:  
<https://www.boe.es/buscar/act.php?id=BOE-A-1985-12666> (in Spanish)

Revised Text 1/2007, of 16 November, of the General Law for the Protection of Consumers and Users (GCA):  
<https://www.boe.es/buscar/act.php?id=BOE-A-2007-20555> (in Spanish)

Revised Text of the Act 1/2013, of 29 November, on Equal Opportunities and Social Inclusion: <https://www.boe.es/buscar/act.php?id=BOE-A-2013-12632> (in Spanish)

Royal Decree 231/2008, of 15 February, regulating the Consumer Arbitration System: <https://www.boe.es/buscar/act.php?id=BOE-A-2008-3527> (in Spanish)

Royal Decree-law 1/2017, of 20 January, on urgent measures to protect consumers regarding floor clauses:  
<https://www.boe.es/buscar/act.php?id=BOE-A-2017-653> (in Spanish)

Spanish Constitution 1978:  
[http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist\\_Normas/Norm/const\\_espa\\_texto\\_ingles\\_0.pdf](http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf)

*English translations of some the abovementioned Acts are available here: <http://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/documentacion-publicaciones/publicaciones/traduccion-derecho-espanol>*

## **2. Other relevant materials**

ADICAE (Consumer association): <https://www.adicae.net/>

BIICL website, 'Focus on collective redress' project. Country Report 'Spain' (M.P. García Rubio/ M. Otero Crespo): <https://www.collectiveredress.org/collective-redress/reports/spain/overview> (see section VII. Bibliography)

CENDOJ (*Centro de Documentación Judicial*): <http://www.poderjudicial.es/search/indexAN.jsp>

CNMC (Spanish Market and Competition Authority): <https://www.cnmc.es/>

OCU (Consumer association): <https://www.ocu.org/>

# SWEDEN

## 1. Legislation

<https://lagen.nu/2011:1211> ( Act on Participation of the Consumers Ombudsman in certain disputes)

[https://zeteo.wolterskluwer.se/document/scl\\_konkurrl\\_2008\\_579](https://zeteo.wolterskluwer.se/document/scl_konkurrl_2008_579) (Competition Act)

<https://lagen.nu/2002:562> ( Act on Electronic Commerce)

<http://www.notisum.se/rnp/sls/lag/19941512.HTM> (Act on unfair contact terms)

<https://lagen.nu/2016:964> (Act on Competition damage)

<https://lagen.nu/2015:671> (Act on alternative disputes resolution)

## 2. Other relevant materials

<http://www.notisum.se/rnp/sls/lag/20020599.htm> (Swedish)

<http://www.government.se/government-policy/judicial-system/group-proceedings-act/> (English)

[https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/forordning-2015739-med-instruktion-for\\_sfs-2015-739](https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/forordning-2015739-med-instruktion-for_sfs-2015-739) ( Standing instruction for the National Board for Consumer Disputes)

<http://rinfor.stage.lagrummet.se/publ/sfs/2015:122/pdf,sv> (Standing Instruction for the Swedish Consumer Agency)

<http://www.government.se/information-material/2008/10/evaluation-of-the-group-proceedings-act---summary-in-english/>

<http://www.government.se/government-policy/judicial-system/the-swedish-code-of-judicial-procedure/>

<http://www.government.se/government-policy/consumer-affairs/the-marketing-act-marknadsforingslagen/>

# UNITED KINGDOM

## 1. Legislation

Civil Procedure Rules

<https://www.justice.gov.uk/courts/procedure-rules/civil>

Civil Procedure Rules Part 19 - Parties And Group Litigation

<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part19>

The Consumer Rights Act 2015

[http://www.legislation.gov.uk/uksi/2015/1630/pdfs/uksi\\_20151630\\_en.pdf](http://www.legislation.gov.uk/uksi/2015/1630/pdfs/uksi_20151630_en.pdf)

Competition Appeal Tribunal - Guide to Proceedings 2015

<http://www.catribunal.org.uk/files/Guide%20to%20Proceedings%20-%202015.pdf>

## 2. Other relevant materials

The national GLO list can be accessed at

<https://www.gov.uk/guidance/group-litigation-orders>

Information in applications for competition CPOs is on the CAT website:

<http://www.catribunal.org.uk>