EUROPEAN
Justice Forum

EJF Summary Response to the Collective Redress Consultation
(20th April 2011)

1. The Commission should determine Collective Redress Policy with an Open Mind
   - In its consultation process, the Commission should *not assume* that EU legislative action is needed.
   - 'Collective redress' is *not* the same as 'collective litigation'. There is a whole range of options to improve collective redress and litigation should be the last resort.
   - There should be *no binding EU measures. If* the EU introduces any measures it must be sure that *they can be implemented together with all necessary safeguards with equivalent effect in each of the Member States*.

2. Private litigation must not be used to enforce EU law: that is the task of public authorities
   - Europe has a strong tradition that public authorities must enforce the public laws that protect its citizens: that approach must be preserved.
   - The American approach of using private class actions to enforce public law is alien to Europe and must not be adopted.

3. The Key to Collective Redress is ADR, Complemented by the Public Authorities and Supported by the Court
   - ADR should be prioritised and claimants should be incentivised to use it before turning to litigation, which should be the last resort
   - Where they can properly do so, the public authorities should encourage infringers voluntarily to remedy damage they cause
   - The Court should support ADR by settling points of law that may keep the parties from resolving their dispute and by overseeing ADR procedures to ensure that they are fair and that due process is followed.
   - The Court should also ensure that, to the extent that public authorities are involved, they do not exceed their remit
   - At the request of the parties engaged in ADR, the court should endorse agreements that have been voluntarily reached to make them both binding and final.

4. ADR offers the Speed, Low Cost and Low Risk that Litigation Cannot
   - ADR *provides the practical solutions* to collective disputes that both claimants and defendants need.
   - ADR is far *more widespread and successfully used* than many people realise. SANCO's 2009 study showed 410,000 claims resolved by ADR in 2006, rising to 530,000 in 2008. In comparison the use of collective litigation in Europe is tiny.
   - *ADR is in line with existing EU measures* e.g. in e-commerce, postal services, financial instruments and the Mediation Directive. ADR is in line with the approach being pursued by SANCO in its current consultation.
   - *The voluntary nature of ADR overcomes many of the problems faced by litigation*.

European Justice Forum
Avenue Marnix 22, B - 1000 Brussels
Tel: +32 (0)2 548 02 66 - Fax: +32 (0)2 227 61 89
Identification number in the transparency register: 84617711913-70
www.europeanjusticeforum.org

- There will be cases *when a party needs to determine his legal rights and obligations with the certainty of a court decision*. He must remain free to do so.

5. Public Authorities can Encourage Infringers to Remedy Damage caused
   - Breaches of regulation disturb the balance of the market place. In restoring that balance and deterring future infringement, public authorities can facilitate remediation of any damage caused.
   - Public authorities are responsible for increasing areas of consumer commerce ranging from food to travel and from telecoms to financial services.
   - *Collective claims are successfully resolved by public authorities* such as the Nordic consumer ombudsmen; the London Financial Services Ombudsman; and the German banking, telecoms and insurance ombudsmen.
   - Such public authorities are not only successful in dealing with justified claims, they are also *effective in filtering out unmeritorious claims*[1]
   - In deterring future infringement and encouraging improved behaviour in the future, public authorities should moderate sanctions in response to an infringer's bona fide actions to improve internal procedures and to make good any damage caused.
   - In order to *ensure that the overall financial burden is proportionate*, a public authority should know the aggregate cost to the infringer both of compensation to third parties before deciding the any financial penalties.

6. Collective Litigation is of Limited Value in Providing Redress
   - The cost, time and high risk mean that *collective litigation is little used* even in the fourteen Member States that already have compensatory court mechanisms.
   - Claims requiring individual adjudication of factors such as contributory negligence, causation, and the pre-existing condition of individual claimants, cannot be properly handled by collective litigation. *Personal injury and product liability claims, for example, should not be submitted to collective litigation.*
   - That is why the US Courts no longer certify such claims in class actions.
   - Collective litigation is inefficient compared to established ADR systems. For example, an agreement resolving Shell Oil investor litigation was endorsed by the Dutch court in less than 9 months. The Deutsche Telekom litigation in Germany has been in progress for more than 5 years and shows no sign of ending.

7. The Existing National Collective Litigation Laws are not precedents for an EU Measure
   - The existing national laws have been little used. They have not been the principle means of dealing with collective claims because there are simpler and better means of doing so.
   - The existing national laws have been adopted to meet *particular national needs* and are *embedded in the separate national legal traditions and rules* of those 14 Member States.

[1] The London Financial Ombudsman handles over 100,000 claims a year and rejects up to 40% as lacking a sound basis. The Danish consumer ombudsman does not keep statistics but is understood also to reject a high proportion of claims.

- There is *little commonality* between the existing national laws so that even they could not be harmonised without considerable disruption to those national systems.
- The differences between the 27 civil justice systems of the Member States are such that –
  (a) a *single binding EU measure of collective litigation* would be unlikely to have the same effect in each Member State; and
  (b) in practical terms the EU could *not realistically design and enforce the essential safeguards* in such a way that they would have the necessary and equivalent effect in all the Member States.
- For those reasons, an EU measure of collective litigation would be likely to have unintended consequences and could lead to the kind of large unmeritorious claims that the EU wishes to avoid.

8. Effective Safeguards are essential in Collective Litigation. Safeguards must include:
   - *Preliminary certification hearings* to ensure there is sufficient homogeneity of the claims and claimants for them to be heard in a single case.
   - *Filtering out unmeritorious claims* in the preliminary hearing.
   - *Individual identification and informed consent of all claimants* (i.e. 'opt-in claims' only).
   - So called 'opt-out' claims, in which claimants are not identified and do not give specific consent raise ethical concerns. *Opt-out claims also infringe the constitutions* of a number of Member States, and they *potentiate fraudulent claims*[2].
   - *The loser-pays rule must always apply* and claimants must be able to meet potential adverse costs orders.
   - *Contingency fees must be banned.* Third party financing and the buying and selling of individual claims with the aim of creating collective litigation should also be forbidden.
   - *Compensation must cover only actual loss* – no punitive damages.
   - *No organisation may bring collective or representative claims* unless it has been certified by its government as meeting objective criteria or independence and impartiality and has the necessary experience and resource to bring such claims.
   - *No collective actions for personal injury or product liability claims* (see above).

9. Controls on Funding
   - The main cause of abusive class action claims in America is the opportunity to make substantial profit from supporting them. Such opportunity must be prevented in Europe.
   - Contingency fees are not the only way in which such profit can be made. The unregulated extension of third party funding to collective litigation, and the sale and purchase of individual claims can provide similar financial motivation.

[2] The opt-in rule applied to a series of group legal actions in London in the 1980s and 1990s. Because the defendant could identify each claimant, it was possible to determine that a high proportion had not in fact been exposed at all to the alleged cause of damage, and their claims were dismissed. Under an opt-out procedure this would not have been possible.

- Representative organisations must not bring claims on behalf of their members if they stand to benefit financially or otherwise from doing so, beyond the recovery of legitimate out-of-pocket expense.

10. Competition Damages
    - DG Competition seems to have been influenced by US policy in proposing collective litigation as the way both to enable consumers to recover competition damages and to enforce competition rules.
    - There is no direct benefit to consumers (or SMEs) in obliging them to engage in long, costly and risky litigation to recover their loss.
    - As argued above, after a final finding of infringement, infringers should be encouraged to enter ADR to agree compensation. An *independent* competition ombudsman with carefully defined powers could be helpful.

The European Justice Forum (EJF) is a coalition of businesses, individuals and organizations that are working to promote fair, balanced, transparent and efficient civil justice laws in Europe. EJF is seeking to ensure that the legal environment in Europe protects both consumers and businesses alike. Its members come from all leading sections of industry including: health care, engineering, power generation, food, electronics, software, financial services, consumer products and motor vehicles sectors. For further information please see our website: http://www.europeanjusticeforum.org