Summary of EJF Position on Collective Redress

In our view, there are aspects of the consumer redress debate that should not be controversial.

First, we think that civil justice systems need the means of managing group actions. There will be occasions when a Court has to deal with a matter concerning large groups of plaintiffs. In order to do so, a collective action mechanism is needed if only to manage the case. We also think that there will be occasions on which consumers may not be able to obtain redress for legitimate grievances without resorting to litigation. To that extent also, a method of collective action may be needed. But we do not think that litigation should be the principal means of redress.

Second, however, we believe all parties agree that settlement is better than litigation. Settlement provides rapid redress without the need for costly, lengthy and inevitably uncertain litigation. Accordingly, while litigation may be necessary as a final deterrent, it should be the means of last resort to be used only when other methods of obtaining collective redress have been shown to fail.

Our aim is to develop a policy model that will encourage settlement and so far as possible avoid litigation, while at the same time obtaining proper redress for legitimate grievances.

We believe that reputable organisations – be they in the public or private sector – should be motivated to make restitution when they have caused damage to others. Such organisations seek to operate within the law and the dictates of ethical practice, and corporate governance is a prime concern. We therefore think that organisations operate in a climate that encourages voluntary restitution.

Nevertheless, we also think that consumers need to have leverage when seeking compensation from large organisations. This leverage can be provided by the public authorities.

Europe has a long tradition of public enforcement of consumer rights. There is a network of regulators and ombudsmen in Europe responsible for most areas of consumer commerce, whether in the field of utilities, transport, medical products, food, financial services or competition. These authorities have a duty to investigate breaches of the regulations that fall within their area of competence, and to impose sanctions where they are due. They are also in an excellent position to use their influence to encourage restitution where it is likely that the breach of regulation has caused damage or loss to third parties. Moreover, in the light of recent economic and financial events, strengthening these regulators is likely to be a focus of Government policy in the coming years.

We also see clear evidence of the success of this policy where regulators use their influence. In the Nordic region, the Ombudsmen are successful in persuading parties to settle the great majority of their grievances. Those countries have the "big stick" of collective litigation, but it is rarely necessary to use it. In the UK, there has been a striking development of Government policy over recent years. The regulators are now expected to seek compensation for those who have suffered as a result of breach of regulations. That policy became a statutory obligation last year by virtue of the Regulatory Enforcement and Sanctions Act 2008.[1]

As an incentive to companies to make voluntary restitution, the regulator can mitigate the penalty it would otherwise impose. The company can also limit damage to its reputation by making it known that it has voluntarily established a compensation scheme.

These are powerful incentives in favour of voluntary settlement.

A third element in this approach is to involve the Court, not as a forum for litigation, but as a means of overseeing and endorsing settlements. The Court should be used to ensure that proper procedures have been followed and that neither side has exercised undue influence over the other. The Court can also give finality to the dispute. It can endorse the settlement as the end of the matter and forbid any further proceedings (settlement or otherwise) relating to the same matter. The Dutch Financial settlement Law 2005 provides an excellent precedent for this role.

In our view, this tripartite approach offers a new and attractive way of providing consumer redress: a focus on settlement procedures; encouraged by the public authorities; and endorsed by the Court.

Only if opportunities for settlement have been exhausted should the last resort of litigation be brought into play. Litigation may be needed to deal with the dishonest or the recalcitrant, but it should not be the main focus of policy.

Finally, we offer a word of caution. It is clear that no one wants to replicate in Europe the American class action system. But it is not clear how such a result is to be prevented. The US system is not simply a "toxic cocktail" of ingredients. There are aspects of American class actions that are particularly dangerous, including contingency fees, "opt-out" actions, punitive damages, the lack of a loser-pays rule and jury trials. It is important that such features are excluded form European legal systems. However, the heart of the problem is funding. Collective litigation is expensive. In the absence of Government funding (which cannot be expected to be available on any scale) the only realistic sources of funding are third parties (normally law firms or insurance companies) who are prepared to undertake the risk of financing litigation in return for a substantial part of any damages awarded. However, if the opportunity for financial gain is sufficient to attract such third party finance, it is also sufficient to carry the risk of abuse. The irony is that *without* liberal funding collective litigation will not be widely used, and *with* liberal funding it will create an incentive to run litigation for the sake of the lawyers more than the patients.

[1] As an example, OFCOM intervened in the case of television phone-in competitions that continued to run after the winner was known. It persuaded the companies to reimburse viewers for the cost of phone calls made after the result had been actually been determined.