



**Consumer  
Focus**  
Campaigning for a fair deal

# **Consumer Focus response to the European Union Commission's consultation on collective redress**

**April 2011**

# About Consumer Focus

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Consumer Focus is the statutory consumer champion for England, Wales, Scotland and (for postal consumers) Northern Ireland.

We operate across the whole of the economy, persuading businesses, public services and policy-makers to put consumers at the heart of what they do.

Consumer Focus tackles the issues that matter to consumers, and aims to give people a stronger voice. We don't just draw attention to problems – we work with consumers and with a range of organisations to champion creative solutions that make a difference to consumers' lives.

# Executive summary

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Consumer Focus welcomes the opportunity to respond to the European Commission's consultation paper on collective redress.

We have long-recognised collective redress as a process that can militate against the factors that discourage consumers, especially disadvantaged consumers from going to court. Collective redress allows consumers to pool together and exercise group strength, while also benefiting from the expertise and support that organisations representing consumer interests can bring. Therefore, our principle argument in favour of collective redress is to extend access to justice for consumers, particularly, although not exclusively for those with low-value claims who are unlikely to pursue individual redress mechanisms. However, it is important to recognise that an efficient and effective collective redress procedure can also result in wider secondary benefits, for example encouraging business compliance with the law and improving judicial economy.

While we accept and would support mechanisms to safeguard against vexatious and unmeritorious cases, we are opposed to overly restrictive procedures which will make the redress mechanism unworkable. For example, we would not support collective redress as a 'follow on' to enforcement action by enforcement agencies or regulators.

We agree that there should be a consistent and coherent European approach to collective redress. This approach needs to be underpinned by overarching principles which will ensure efficiency and effectiveness. Outlined below are some key features we would like to see in any collective redress proposal.

- The power to bring collective action should be given to all consumer organisations
- The courts should decide whether a consumer organisation is suitable to bring collective actions for each case based on an indicative criterion, set out in legislation
- Collective action should not be restricted to 'follow on' actions by an enforcement agency or a regulator
- Consumer organisations or individuals should be able to bring collective actions on behalf of consumers at large (opt out procedure) not just named consumers (opt in)
- The scope of collective actions should cover all business to consumer transactions, highly regulated areas such as financial services, should not be exempted
- Thorough consideration should be given to the funding of such cases, including the applicability of sensitive cost rule. Legislation should not constrain consumer organisations from using market mechanisms such as Conditional Fee Arrangements
- A written agreement of how damages will be distributed should be signed at the outset and the representative (under strict guidelines) should be able to take a slice of the damages to cover costs.
- In consumer cases the amount involved for individual claimants will sometimes be small, but the overall aggregate sum might be large. Any collective redress system should allow cy-pres distributions that indirectly benefit consumers as a whole in some way relating to the purposes of the case, for example by funding a consumer education campaign or reducing prices over a defined period
- All early settlements should be judicially approved

# The benefits of collective redress

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## Extending access to justice for consumers

While we agree that early settlement of disputes should be encouraged where possible, and the courts should be viewed as a last resort, the rule of law is undermined if consumers are given rights they cannot enforce. A range of informal and formal mechanisms already exist to enable consumers to achieve redress, including individual-led group actions through the courts in England and Wales. It is however important to note that there is no provision for multi-party actions in Scotland. Perhaps more importantly, such procedures are rarely used and a number of obstacles prevent consumers from effectively combining forces in situations where they collectively suffer harm:

- Consumer claims often involve relatively small amounts of money (although these may be significant for the person concerned) that, individually, it might not be economic to recover through litigation
- Some cases are high-value and involve complex argument or specialised evidence that is beyond the resources of individuals. These cases are expensive to pursue and difficult to win without support. The involvement of expert organisations can help consumers and also assist the court to achieve justice
- Many consumers, especially those who are disadvantaged, are discouraged from going to court. The available evidence suggests that generally speaking, most people would prefer to avoid becoming involved in legal and court processes. Most people are apprehensive about involvement with lawyers; they are very concerned about the potential costs, formality, delay and trauma they associate with legal processes<sup>1</sup>. People may be inarticulate or shy of attempting to express their grievances and may fear going to court or fighting large corporations. They might lack legal advice or simply may be unaware of their rights

Collective redress provides a means for consumers to enforce their rights. They allow consumers to pool together and exercise group strength, while also benefiting from the knowledge and expertise that consumer organisations bring. Representative actions provide one way of helping to level the unequal playing field between consumers and business.

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<sup>1</sup> See: Pascoe Pleasance, *Causes of Action: Civil Law and Social Justice*, 2<sup>nd</sup> edition, Legal Services Research Centre, 2006; Hazel Genn and Alan Paterson, *Paths to Justice Scotland: what people in Scotland do and think about going to law*, Oxford University Press, 2001; and Scottish Consumer Council, *Civil Disputes in Scotland: a report of consumers' experiences*, 1997

## Contributing to fair and competitive markets

If consumers cannot enjoy their rights then business has less incentive to obey the rules. Quite simply, there is little point in creating market rules if these cannot be effectively enforced. In order to deter illegal behaviour on the part of businesses, the penalties available to the regulatory and judicial systems must exceed the gains from treating consumers unfairly or even illegally. A weak redress system inhibits competitive markets. Consumers will not have the confidence to participate in markets and fuel economic growth unless they are able to gain redress when firms cheat or make mistakes. The absence of effective redress mechanisms also protects inefficient firms. Traders who break the law and escape paying compensation gain an unfair advantage over their fair dealing competitors.

Finally, collective redress can allow the courts to develop case law, set precedence and supplement existing rules where these are inadequate to control undesirable practices. collective redress can therefore positively modify behaviour in markets and so enable them to function more efficiently. This is particularly relevant in consumer contexts, where the landscape is constantly evolving and primary legislation is often unable to keep up.

## Promoting judicial economy

Contemporary society has given rise to new forms of needs and claims that were unknown fifty years ago. In a mass producing and mass consuming society, one product or service has the capability to injure or cause other loss to a large number of people. The prevailing civil redress procedures throughout Britain are based on an individual system – a victory for one consumer does not apply to others similarly affected. Collective redress should help bring the legal system in line with modern expectations about what consumer redress should deliver and the reality of our everyday lives.

# Collective redress in practice

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## Who should be empowered to bring collective action cases?

Consumer Focus prefers an approach that allows action to be initiated by anyone who belongs to the actual class of persons who have sustained loss, or by consumer associations, trusts, or public bodies if the action falls within the scope of their purpose.

Consumer Focus is strongly of the view that there will be occasions when it will be perfectly valid and indeed appropriate for other consumers groups, particularly small or single issue consumer groups to bring cases on behalf of consumers. These groups may have specific and specialist knowledge and may indeed be in the best position to represent consumers on occasions. Indeed, a wide number of organisations represent disadvantaged consumers.

It should be noted that our preferred approach is the one adopted in Denmark, Norway, Sweden, and Portugal and indeed under Dutch law. Even in Finland where the more restrictive approach of designating a single actor is adopted<sup>2</sup>, individuals have a subsidiary right to act, namely when the Consumer Ombudsman has decided not to bring a case<sup>3</sup>.

Collective redress should not be 'follow on' actions or be subsidiary to enforcement by public bodies.

Consumer Focus does not believe that the access to justice gap which exists as a result of a fragmented approach across member states can be filled by strengthening public enforcement instead of devising a collective redress mechanism. In the UK, much has been said about the Regulatory Enforcement and Sanctions Act 2008, which allows enforcement agencies<sup>4</sup> to impose restorative penalties on businesses that have breached the law. Restorative penalties can compel companies to repair the damage that consumers have suffered due to a breach of the rules, including financial compensation. While we welcome this development, we do not think these powers are an alternative or substitute to a collective redress procedure. Firstly, the track record of regulators when it comes to using enforcement powers does not fill us with confidence that restoration notices will be used very often. Secondly, regulators do not have the resources to pursue every case where action is required. For instance, the UK's Office of Fair Trading, has in the past stated its intention to focus on a small number of high impact cases. It has stressed the need for partnership between private and public enforcement to allow more meritorious claims to be pursued. This in itself shows the need for multiple efforts in this area.

Moreover, in a study on representative actions and restorative justice by the University of Lincoln<sup>5</sup>, it was noted that most enforcement agencies see their role as achieving business compliance with the rulebook rather than to obtain compensation for consumers. It is also important to note that fines obtained from infringements of rules or a regulation goes to the public purse and not to private individuals. Moreover, the global

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<sup>2</sup> In Finland the Consumer Ombudsman is the primary designated body empowered to bring class action cases

<sup>3</sup> Collective Redress Procedures – European Debates, Duncan Fairgrieve and Geraint Howels

<sup>4</sup> Via statutory instrument

<sup>5</sup> A Representative Actions and Restorative Justice: A report for the Department of Business Enterprise and Regulatory Reform (BERR) December 2008

financial crisis means that funding for enforcement agencies are dwindling; this means that enforcement bodies will be under increased pressure to prioritise, in this climate, it is highly unlikely that restorative justice will be a priority even where considerable consumer detriment occurs.

We are also opposed to any suggestion which would see collective redress cases restricted to ‘follow on’ action, meaning that a collective redress case will only be allowed where the regulator or an enforcement agency has made an infringement decision. This will only serve to limit the number of cases that can be brought. We do not accept the argument that restricting collective action to ‘follow on’ cases will ensure that only credible cases go to court. In fact it is more likely to prevent meritorious cases. Moreover, this proposal will greatly erode the independence, initiative and capability to challenge illegal actions as and when necessary.

## An ‘opt out’ or an ‘opt in’ process

Consumer Focus believes that an ‘opt out’ mechanism will provide the most effective form of collective redress. The option of allowing actions to be brought on behalf of consumers at large (opt out) as opposed to bringing a case for named consumers (opt in) is the most effective and efficient way of ensuring that collective redress makes a real difference.

The ‘opt out’ procedure is more suitable for low-value claims, where consumers are more unlikely to be aware that their rights have been infringed. The unnamed route also serves disadvantaged consumers better, who for various reasons face additional barriers to participating in legal actions. Therefore, it is a more inclusive approach and is the most consistent of the options of promoting access to justice. Moreover, allowing actions to be brought on behalf of consumers at large offers the best means to hold firms accountable for the harm they have caused. It cannot be right that errant businesses can escape their responsibilities because people are unaware of a problem or do not have sufficient incentive to take legal action. The common argument against the ‘opt out’ approach is that it is susceptible to abuse. But this approach is used in collective redress systems in other countries, without it causing a floodgate of unmeritorious cases. Moreover, procedural safeguards and active case management can overcome any risk of vexatious claims. Finally, to mitigate against the fear that an opt out procedure will open floodgates of unmeritorious cases, we support a court based approach; where judges determine the appropriateness of whether a case should be on an ‘opt out or opt in basis’.

## Funding collective redress cases

Without adequate provision or creative ideas about the funding of collective redress cases, we are doubtful whether the procedure will be used. An important principle of access to justice is that claimants should not be denied access to the courts because they do not have the means to litigate. Equally, lack of means should not disqualify consumer organisations or individuals from taking representative actions. The use of collective redress is likely to be minimal without mechanisms to insulate consumer bodies from the cost consequences if they lose and to pay for disbursement costs, such as expert witnesses, which might be considerable. Consumer organisations that are willing to take on cases are likely to be reluctant to do so if they are left to bear the financial risk.

The standard model in the UK is that the losing party is exposed to the majority of the opponent’s legal costs. We do not consider this a satisfactory arrangement in respect of collective actions. We think that a mixture of the following options should be considered:

- Establish a collective actions fund – this is a fund which takes a proportion of the money received by a successful claimant to meet claims on the fund by unsuccessful claimants. It is accordingly a form of mutual insurance, although

the initial funding would need to be provided by the states. The administration costs of the scheme would be met by charging a registration fee to all applicants, and applicants would have to demonstrate that they had a good chance of success. The main advantages are that it protects consumer organisations from financial risk and ensures that all moneys paid into the fund are used for the public good.

- Apply sensitive costs rules, for example ‘no costs’ agreements, whereby each party promises not to seek a costs order against the other, regardless of the outcome. However, the consumer organisation would still have to cover its own costs, which might be large. Alternatively, there might be a ceiling on the maximum costs of a losing representative claimant, similar to the small claims system.
- Utilise existing market mechanisms, such as contingency fees, third party funding and insurance-backed conditional fee arrangements. This shifts the risk from consumer organisations onto lawyers, but a main drawback is that lawyers take a slice of claimants’ winnings, and often this cut is considerable.

## Out of court settlement

Consumer Focus is of the opinion that any collective redress mechanism should require judicial approval for out of court settlements. Experience elsewhere shows that class action suits tend to be settled early out-of-court. Consistent with the norm in these countries, early settlements should be judicially approved. This protects claimants who are in a poor position to know whether the settlement proposed by the defendant is fair and reasonable. It is tempting for lawyers acting on behalf of claimants to settle out-of-court to obtain their fee rather than risk losing all in the courtroom. It also protects defendants from being effectively blackmailed by claimants, who know that the reputation loss from the negative publicity that can result from a drawn-out case may actually outweigh the value of the claim. Judicial approval also has the advantages of binding the whole class, which could prove useful if similar claims emerged in future.

## Quantification of damages

Consumer Focus’s view is that a written agreement of how damages will be distributed in the event of winning a case should be signed at the outset, and that the representative body should be able to agree with claimants to take an amount, proportion or percentage of awards to cover their legal and administrative costs. However, this approach will not work in a system involving unnamed consumers, but other jurisdictions have developed means for assessing damages in this scenario, for example by calculating harm caused with reference to the amount of product sold or by using the defendant’s own records. For example, if a utility company was found guilty of overcharging its customers, the loss is easily calculable and damages could be readily distributed by refunding the amount owed or deducting it from future bills.

In consumer cases the amount involved for individual claimants will sometimes be small, but the overall aggregate sum might be large. In these situations, it may not be worthwhile or impracticable to distribute damages to consumers individually. Collective redress systems in other jurisdictions allow cy-pres distributions that indirectly benefit consumers as a whole in some way relating to the purposes of the case, for example by funding a consumer education campaign or reducing prices over a defined period. This has precedent in UK competition law settlements, for example in 1993 Rover paid £1 million for car research to the Consumers’ Association to compensate for breach of competition laws. Therefore, we would encourage the provision for cy-pres distribution of settlements in collective redress procedures.

## Alternative dispute resolution and Settlements out of court

Consumer Focus supports Alternative Dispute Resolutions (ADR) where appropriate, as it provides a viable alternative to going to court. We know that ADR's can be less expensive, quicker and less formal than litigation. However, such schemes currently work at an individual level, and are not designed to deal with mass complaints. Moreover, we know that the quality and quantity of ADR schemes are not consistent across the consumer landscape<sup>6</sup>. Equally important is the need to be cautious as ADR mechanisms may impact on the freedom of organisations to disclose the results of the settlement and may prevent precedent that can only be developed by legal proceedings. More importantly, it is important that ADR schemes and out of court settlements are not convoluted.

## Access to information

Decisions to take collective action will depend on whether the necessary information to do so is available. Access to information is therefore an important component of any collective redress mechanism. We would like to see adequate provisions made in this respect. Without access to relevant information, it would be difficult to investigate actions or doing so may depend on the availability of disproportionate resources.

We know that confidentiality will often be used as an excuse for non disclosure of information, but as has recently been suggested<sup>7</sup>, regulators can act as a gatekeeper to monitor the information request. The tension between information requirements and confidentiality will however require legislation to define the rules under which information must be shared.

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<sup>6</sup> See *Lessons from Ombudsmania*, an NCC publication, 2008

<sup>7</sup> Guidelines for Consumer Organisations on Enforcement and Collective Redress, G. Howel and H.M. Micklitz



## **Consumer Focus response to the European Union Commission's consultation on collective redress**

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Published: April 2011

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