Financial Services User Group's (FSUG)

response

on Towards a coherent European approach to collective redress

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FSUG response on
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For the purposes of this response 'consumer' refers to each individual, household, small business owner buying financial services; this consumer is a saver, a borrower, a retail investor, an insured, etc.

The Financial Services User Group (FSUG) welcomes the opportunity to comment on the above consultation while regretting that the European Commission, despite its long term awareness of the existing problems that consumers, retail savers/investors and all users of financial services including small business owners (hereafter referred to collectively as 'consumers') are faced with in mass detriment situations (as confirmed by the findings of the Civic Consulting studies[1]), and while recognising that the performance of existing EU enforcement tools in those situations is not satisfactory[2], has not yet taken any concrete measure but chose to engage again into a consultation.

As stated in the Civic Consulting studies, **the most relevant sector concerning observed mass claims/issues is the financial services sector and this was observed before the financial crisis reached its peak** (see some examples in annex).

Collective redress covers a specific situation where the (same) illegal behaviour (fraudulent or not) of a provider or an issuer harms several individuals. Those individuals should be able to gather their claims so that they can act in unison against the provider/issuer for compensation of the damage which they have suffered individually.

Judicial collective redress for consumers currently operates nationally only in 14 Member States; as regards collective redress against issuers there is only the Dutch model (WCAM[3]) that investors can rely on within the EU. Even where it is available, the effectiveness of the mechanisms varies significantly. This leads to a significant discrimination in access to justice to the detriment of consumers. Consequently, cross-border redress is currently difficult to implement and consumer confidence in the internal market is put in doubt. The same applies to retail investors' confidence in the financial markets and industry, especially following the 2008 financial crisis, and the lack of any significant indemnification of non insider retail investors since then.

Lack of compensation is a major deficiency in a legal system and allows for illegal profit to be retained by business. In EU anti-trust situations alone, unrecovered damages are estimated to surpass EUR 20 billion each year[4]. Apart from these figures, the current situation is not only unacceptable from the point of view of victims, but also imposes unequal market conditions on those businesses which abide by the rules. Therefore FSUG believes the introduction of collective redress for mass damages in the EU would help not only consumers, but business also.

FSUG's key demand is for a binding instrument at Community level. A collective redress mechanism should be available to every European consumer for both national and cross border cases irrespective of the value of the claim. We are convinced that a European initiative setting the main features that a judicial group action mechanism must respect is the way forward and the most efficient tool to improve the functioning of the market in favour of both consumers and law-abiding financial services' providers.

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[1] Study regarding the problems faced by consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems, August 2008, http://ec.europa.eu/consumers/redress_cons/finalreport-problemstudypart1-final.pdf.

[2] EC Green Paper on collective redress COM(2008)794 final and White Paper on Damages Actions for Breach of the EC antitrust rules COM(2008)165.

[3] Wet Collectieve Afwikkeling Massachade ('Collective Settlements Act').

[4] DG Competition figures.

At a minimum, the EU should ensure that consumers and users of financial services all have access to collective redress with minimum standards irrespective of whatever Member State they are residents, and that any EU citizen or group is eligible to avail of any collective action in any Member State if the damage occurred with a provider domiciled in that Member State.

FSUG ANSWERS TO EUROPEAN COMMISSION QUESTIONS

Added value of collective redress for improving the enforcement of EU law

Q1: *What added value would the introduction of new mechanisms of collective redress (injunctive and/or compensatory) have for the enforcement of EU law?*

For FSUG, the EU should adopt legislative measures in the field of collective redress for the following reasons:

- In our mass production and mass consumption society characterized by the harmonisation of standards, it is possible for sellers and providers to have access to a huge market (500 million consumers in the internal market). Within such a market, non compliance with legal rules can easily affect a high, even a very high number of European consumers. The collectivisation of damages justifies the collectivisation of redress claims.
- Creation of a level playing field.
- More and more consumer protection rules in the financial services area are decided at European level, therefore minimum/basic rules on redress mechanisms should also be adopted at European level. Without redress mechanisms, even the best EU legislation cannot be implemented and enforced efficiently. When EU legislation was only embryonic, the question of redress mechanisms could be left to national law. However, this is not the case anymore. The development of substantive law should go hand in hand with the development of redress tools for its effective enforcement.
- Furthermore, the example of the Small Claims regulation, Injunction and Mediation directives proves that the EU has the competence to act on procedural rules. Also, the on-going work in the Commission on Alternative Dispute Resolution (ADR) does not seem to be limited to cross-border disputes.
- European consumers suffering from a damage caused by the same financial services provider should be able to join their claims together into one single action in all the European Member States. The same is true for retail investors suffering damages caused by the same issuer. Today, some European consumers are not able to obtain compensation while others residing in another Member State are, thus creating inequalities of treatment. Collective redress mechanisms are being developed differently across the EU and as a result consumers are being treated differently according to their place of residence. European measures setting minimum requirements for a collective redress judicial mechanism should therefore be put in place.
- Furthermore, the integration of European markets and the consequent increase in cross-border activities, highlight the need for EU-wide consistent redress mechanisms. There are numerous cross border mass detriment situations where consumers are left empty-handed because of the lack of appropriate mechanism.
- In addition to the direct benefit for consumers, law-abiding businesses and the courts, the introduction of European collective redress would bring a preventive effect against infringements since the existence of judicial redress mechanism is an incentive for businesses to comply with the law.

- Certainty of the legal framework for companies/providers too. They would not be faced with different legal systems within the single market, and this would be beneficial for their own business management and legal risk.

The right to compensation and the right to access to justice (recognized at EU level[5]) should not remain theoretical. In practice, many consumers currently are unable to exercise these rights because of the inadequacy of existing means of redress to mass claim situations. The right to act collectively should be recognized at EU level.

This is all the more critical in the area of financial services, as:

- financial products and services have a tremendous impact on the well being of EU citizens, active and retired,
- and they are often quite technical and complex. The damage itself is often quite difficult to quantify, even for lawyers (see for example pension fund damage case in annex).

Furthermore, it has been established that the vast majority of consumers (79 %, even 90 % in Ireland) would be more willing to defend their rights in court if they could join a collective action[6].

Experience in the Member States with an effective collective redress mechanism also demonstrates that consumers make use of it. For example, in Spain, la Organización de Consumidores y Usuarios (OCU) so far has carried out 35 actions of different nature. The total number of members in this kind of actions exceeded 47 000. In another on-going case in Spain, launched by the Asociación de Usuarios de Bancos, Cajas y Seguros de España (ADICAE) against the minimum interest mortgage repayment clause, more than 20 000 consumers have already joined in the action.

An EU legislative initiative on collective redress is necessary to set the minimum features and safeguards of a collective redress mechanism and to ensure its availability in all Member states for both national and cross-border cases. According to DG Health and Consumers "consumers in Member States, which do not have collective redress mechanisms in place, are likely to suffer a detriment as a result of the unavailability of such mechanisms"[7].

Existing individual redress mechanisms are not suitable for mass consumer claims. This position is fully reflected by the European Commission's own assessment in the previous consultation paper, when defining the lack of efficiency of the current legal framework[8].

Q2: *Should private collective redress be independent of, complementary to, or subsidiary to enforcement by public bodies? Is there need for coordination between private collective redress and public enforcement? If yes, how can this coordination be achieved? In your view, are there examples in the Member States or in third countries that you consider particularly instructive for any possible EU initiative?*

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5 Article 6 of the European convention on Human rights, http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457- 5C9014916D7A/0/EnglishAnglais.pdf.

6 Second Edition of the Consumer Markets Scoreboard COM(2009)25, Part 2, page 10 and Flash Eurobarometer 299, *Consumer attitudes towards cross-border trade and consumer protection*, March 2011.

7 Study Part I, page 16 (see reference above).

8 See Green Paper on collective redress.

What regards strengthening of the public enforcement instead of providing for judicial collective redress available to private organisations, it has to be underlined that public enforcement by way of ceasing the infringements and imposing fines does not in itself enable consumers to be compensated for the damage suffered. In addition, even where they would have adequate powers, public authorities often would have limited resources or would not see it as their priority to engage into ordering compensation for individual consumers. Therefore private compensatory collective redress should never be subsidiary to enforcement by public bodies – the two are complementary, but independent processes.

If penalties are actually imposed by authorities, compensations should follow by default, this should be automatic; actions would be needed to determine the "quantum" (how much it is due).

It has also to be taken into account that in some countries (e.g. Germany) traditionally there is not much public enforcement of consumer protection at all, so the option of coordination between private redress and public enforcement would be complicated.

Therefore compensatory collective redress should always be available to private organisations, notwithstanding, whether public authorities are also entitled to claim compensation on behalf of consumers or not.

Q3: *Should the EU strengthen the role of national public bodies and/or private representative organisations in the enforcement of EU law? If so, how and in which areas should this be done?*

Most of the national financial supervisors do not consider that consumer protection really forms part of their priority, even if they say the contrary (see FIN-USE report on the voice of financial services users). This is not too surprising as even the Level 3 European Financial Supervisors only rank client protection as their number 6 and last objective. Besides, financial services users are very much under represented in these European[9] and national financial supervisors, when represented at all. This means that several EU legislations applicable to financial services providers like MIFID, consumer credit directive, unfair commercial practices, etc. are not properly enforced at national level. In 2011-2012, several new directives and regulations will be adopted at EU level (mortgage credit, SEPA, access to basic payment account, investor protection, etc.); this set of legislation requires the EU regulator to ensure that they will be properly enforced everywhere in the EU. Each Member States should have to set up a real Financial Consumer Protection body, whatever its legal structure, in order to enforce consumer rights in the financial services area. Such requirement should not prevent private organizations from claiming compensation on behalf of victims of infringements.

Q4: *What in your opinion is required for an action at European level on collective redress (injunctive and/or compensatory) to conform with the principles of EU law, e.g. those of subsidiarity, proportionality and effectiveness? Would your answer vary depending on the area in which action is taken?*

Q5: *Would it be sufficient to extend the scope of the existing EU rules on collective injunctive relief to other areas; or would it be appropriate to introduce mechanisms of collective compensatory redress at EU level?*

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9 For example, only two in the 30 member Pension Stakeholder Group of the EIOPA.

Questions 4 and 5 are surprising because the two actions do not pursue the same goal: an injunction action is an order granted by a court whereby someone is required to do or to refrain from doing a specified act while a compensation action aims at compensating victims of damages.

As regards injunction action, there is a clear need to extend the scope of the Injunctions Directive 98/27/EC which is limited to very few directives and can be used by a limited number of qualified organisations. For most of the EU legislation aiming at protecting consumers in the financial services area, a collective injunctive mechanism is needed both at national and cross border level.

The FSUG would like to draw attention to the number of injunctive actions brought by consumer organisations to put an end to a fraudulent practice. However, consumers have to act individually to obtain compensation, and in most cases they will not do that, once again demonstrating the need of collective redress.

Compensatory collective redress should cover all sectors where mass damage due to the breaches of EU law is possible and not be limited just to the areas of consumer law or competition. Even if there is not yet a real retail financial services single market for consumers, many financial services providers operate in many Member States as do companies, meaning that also in the interest of retail investors collective redress actions against companies are strongly needed.

Q6: *Would possible EU action require a legally binding approach or a non-binding approach (such as a set of good practices guidance)? How do you see the respective benefits or risks of each approach? Would your answer vary depending on the area in which action is taken?*

The adoption of non-binding policy instruments, despite their usefulness in setting up general guidelines, will not address the main challenges faced by consumers (as explained under Question 1). The lack of binding effect will not solve consumer difficulties in obtaining redress as it would be dependant on voluntary compliance of Member States.

For the sake of efficiency, FSUG would advocate for a binding instrument calling for the establishment of a judicial group action mechanism in every member state. Such instrument could be a minimum harmonisation directive. Non-binding measures have proved inefficient or difficult to implement (e.g. 2001 recommendation on out of court bodies involved in the resolution of consumer disputes) and will not reach the aim of the Green paper i.e. to provide solutions in order to close the gaps to effective redress.

The adoption of a non-binding instrument will not address the problems related to the divergence of current national systems, as its effectiveness will depend on the voluntary compliance by Member States; nor will it sufficiently tackle the uncertainties regarding cross-border collective redress. In addition, some non-binding instruments have proved to be ineffective or difficult to implement (see the European Standardised Information Sheet for mortgage credit[10]).

[10] See the IFF study on the implementation of the code of conduct on home loans carried for Internal Market and Services DG, June 2003, http://ec.europa.eu/internal_market/finservices-retail/docs/home-loans/home-loans-final-report_en.pdf.

FSUG response on
Towards a coherent European approach to collective redress

General principles to guide possible future EU initiatives on collective redress

Q7: *Do you agree that any possible EU initiative on collective redress (injunctive and/or compensatory) should comply with a set of common principles established at EU level? What should these principles be? To which principle would you attach special significance?*

Q8: *As cited above, a number of Member States have adopted initiatives in the area of collective redress. Could the experience gained so far by the Member States contribute to formulating a European set of principles?*

Q9: *Are there specific features of any possible EU initiative that, in your opinion, are necessary to ensure effective access to justice while taking due account of the EU legal tradition and the legal orders of the 27 Member States?*

Q10: *Are you aware of specific good practices in the area of collective redress in one or more Member States that could serve as inspiration from which the EU/other Member States could learn? Please explain why you consider these practices as particular valuable. Are there on the other hand national practices that have posed problems and how have/could these problems be overcome?*

Q11: *In your view, what would be the defining features of an efficient and effective system of collective redress? Are there specific features that need to be present if the collective redress mechanism would be open for SMEs?*

FSUG welcomes the definition of common horizontal principles that should apply to any initiative on collective redress. Already in 2008, the European Commission had sought to consult stakeholders on the definition of benchmarks for collective redress. Most of the principles identified by the Commission in the current consultation are the same as three years ago and despite a significant number of studies and public consultations.

There is a wide consensus on the need for the EU to define the main features of an EU-specific legal instrument of collective redress in line with the legal traditions of EU Member States. These features should also serve as safeguards against the risks of abuses that have been witnessed in third countries, with diametrically different legal systems than the EU.

Member States shall make sure that their collective redress schemes comply with the features established at EU level. However, they should remain free to decide the exact way on how to transpose these requirements into their national legal system. Therefore, the impact on national procedural rules will remain limited.

The main features of an EU-specific legal instrument of collective redress should be the following:

- Has a wide scope.
- Aims at obtaining compensation.
- Allows for standing of qualified organisations.
- Covers both national and cross-border cases.
- Gives the court final decision over admissibility of claim.
- Covers identified and non yet identified victims.

- Address the potential issues of conflicting interests (due to adverse effects of consumer information gap and investment knowledge asymmetry11) by introducing 'control mechanisms by regulating the conduct of class representatives and improving quality of class representation'[12].
- Be accompanied by information measures directed at consumers/victims.
- Controls out-of-court settlement.
- Allows for compensation to be distributed fairly.
- Foresees efficient funding mechanisms.

FSUG would also like to stress that the definition of these common principles should not further delay the adoption of specific legislative initiatives, be in the competition field or in the consumer protection field. At a moment when EU Member States are in the process of considering the adoption of rules on collective redress, the need for some common principles to apply at EU level is more than necessary. It is only by laying down a number of fundamental principles into a Community instrument that the principle of equality of treatment of victims of illegal behaviour will become effective, irrespective of where the damage claim is brought and which national law is applicable.

Concerning national experiences, **instead of always referring to the abuses of the US class action system that nobody wants to implement within in the EU, it is high time that EU decision-makers learn from the European successes and failures.**

Among those EU Member States with a system in place, Portugal is the country with a fully judicial collective action system that encompasses all of the main features identified above. This mechanism works efficiently because of reduced formality requirements, wide cause of actions and reduced costs for consumer organisations in bringing such claims. The procedure allows for compensation of damages but not punitive damages. Portuguese consumers have benefited from this legislation for 14 years and there has not been any case of misuse or fraudulent use of the procedure. This assessment is confirmed by the European Commission's own analysis[13].

It is equally important to learn from the deficiencies of less efficient national systems.

For instance, the requirement of a mandate by each individual victim for the launch of an *'action en représentation conjointe'* in **France**, has proven complex and time consuming, and therefore extremely rarely used. Similarly, the system Group Litigation Orders in England and Wales does not provide sufficient or effective access to justice for a wide range of citizens, particularly but not exclusively consumers, small businesses, employees wishing to bring collective or multi-party claims, while there is considerable evidence that meritorious claims, which could be brought, are currently not being pursued[14].

The 'class action suit **Austrian** style' has substantial deficits in terms of affording redress:

- Admissibility of the lawsuit: sued businesses regularly contest whether this lawsuit is admissible so admissibility has to be decided as a preliminary issue in each procedure. This step can cause substantial time delays.

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11 Issues that typically arise in all agency relationships.

12 See detailed explanation in answer to Question 24.

13 Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union, Study by Civic Consulting.

14 Civil Justice Council paper on the UK, http://www.civiljusticecouncil.gov.uk/files/Improving_Access__to_Justice_through_Collective_Actions.pdf.

- Individuals or institutions must present themselves as plaintiffs for the class action. This step entails a substantial risk of legal costs because the plaintiff is liable for legal costs. If no one is willing to step forward as a plaintiff, no group lawsuit is filed.
- A class action must be preceded by individual claims being bundled and assigned. These processes are elaborate and sometimes fail because not all stakeholders agree to have a representative entity bring the claims.
- Class action is not suitable for cross-border actions because the European Court of Justice and the Austrian Supreme Court rule that the consumer's jurisdiction is lost when collection is assigned.

In **Germany**, the Capital Markets Model Case Act (*Kapitalanleger-Musterverfahrengesetz*) allows for group actions in the securities litigation context. The so-called KapMuG law provides for a lead case procedure to handle collective (minimum 10) individual securities actions where there is incorrect, misleading or omitted capital market information relating to shares or other investments. According to a report published in May 2010 commissioned by the Federal Ministry of Justice it appears that by September 2009 (four years after the introduction of the law)[15], only in 24 matters requests for lead case processing were published in the public register of claims of which the most important case was the Deutsche Telekom case with 16,000 claimants. This shows how reluctant investors are, to bring action under the Act, mainly because:

- model case proceeding has proved to be slow and cumbersome,
- a model case hearing cannot take place until each of the individual claims filed has been suspended and individual objections to suspensions and related decisions must be reached on a case-by-case basis,
- the KapMuG procedure will not substantially reduce costs to plaintiffs because there is no real aggregation of claims,
- the court ruling is only binding for claimants.

Lastly, the limits of out of court settlements is demonstrated in **the Netherlands**, where the mechanism established by the act on collective settlement of mass damages has only been used four times since its enactment in 2005 due to the lack of a judicial collective action for compensation. As a result, consumers, and their representatives, are totally dependant on the other party's willingness to settle and the act does not provide enough incentives for the latter to actually reach a settlement, although private shareholders have been more successful.

In order to overcome the difficulties and the problems above, the development of a system complying with the features listed above is essential. For instance, the possibility for a representative body, including consumer/retail investor association, to launch a collective action on behalf of all identified and identifiable victims (opt-out), without the requirement of an official mandate from each one of them, would increase the representativeness of the action and would allow for the biggest number of victims to get compensation. Any concerns regarding the compliance of such a procedure with the individual right of access to justice are only theoretical, since the opt-out would only concern the launch of the action and not the receipt of the compensation, where the victims would in most cases have to opt-in.

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15 http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/Abschlussbericht_KapMuG_Frankfurt%20School_2009.pdf?__blob=publicationFile

Similarly, the limits of the Dutch system would be overcome by allowing for the possibility of court action upon failure of achieving an out of court settlement deal. For further details regarding the relationship between out of court and court mechanisms, see below.

The need for effective and efficient redress

Q11: *In your view, what would be the defining features of an efficient and effective system of collective redress? Are there specific features that need to be present if the collective redress mechanism would be open for SMEs?*

Q12: *How can effective redress be obtained, while avoiding lengthy and costly litigation?*

We are calling for a procedure where the group representative can act on behalf of identified, or not yet identified victims i.e. where no mandate is required as a prerequisite to bring the action. The requirement of a mandate from each victim is at the core of the problem faced with by consumer associations (see French system).

The importance of information and of the role of representative bodies

Q13: *How, when and by whom should victims of EU law infringements be informed about the possibilities to bring a collective (injunctive and/or compensatory) claim or to join an existing lawsuit? What would be the most efficient means to make sure that a maximum of victims are informed, in particular when victims are domiciled in several Member States?*

Q14: *How the efficient representation of victims could be best achieved, in particular in cross-border situations? How could cooperation between different representative entities be facilitated, in particular in cross-border cases?*

Information of victims about the collective actions plays a major role in the effectiveness of the procedure. On the one hand, in order to effectively opt-out or opt-in the procedure, consumers need to be aware that they have been the victims of the same illegal practice and that there is a collective action launched or to be launched. On the other hand, such information should not amount to the unethical ‘advertisements’ of actions.

Bearing this in mind and in order to avoid any potential abuses, and as mentioned above when describing the role of the court in the process, the judge should decide on the best way to inform consumers taking into account the specificities of the case. Normally the procedure could already foresee the direct notification of interested persons that are known to the parties (and it would be up to the court to decide which means are best suited for that), as well as for public notification, e.g. through announcements in newspapers, of potential victims that are unknown to the parties. In the cross-border cases, the court could have discretion to order announcements in the relevant foreign newspapers including online.

In addition, in order to facilitate the cooperation between the entities that will be qualified to take actions, and especially in cross-border cases, an EU-wide register of launched and ongoing cases could be established.

The aim of a Group Action is to allow a large number of consumers to obtain redress. This objective can only be achieved if they know that such action is taking place and then take the necessary steps to include or exclude themselves from the group.

In the opt-out case, the consumer who may want to exclude himself from the group, in order to bring an individual action or because he does not want to claim compensation, needs to know that such action has been initiated. In an opt-in scenario, the consumers who have been affected by the illegal practices need to know that such an action is taking place to join the case if they so wish.

Whether the procedure is opt-out or opt-in, it is crucial that appropriate measures are taken to inform consumers, through the media, of such a procedure.

The need to take account of collective consensual resolution as alternative dispute resolution

Q15: *Apart from a judicial mechanism, which other incentives would be necessary to promote recourse to ADR in situations of multiple claims?*

Q16: *Should an attempt to resolve a dispute via collective consensual dispute resolution be a mandatory step in connection with a collective court case for compensation?*

Q17: *How can the fairness of the outcome of a collective consensual dispute resolution best be guaranteed? Should the courts exercise such fairness control?*

Q18: *Should it be possible to make the outcome of a collective consensual dispute resolution binding on the participating parties also in cases which are currently not covered by Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters?*

Q19: *Are there any other issues with regard to collective consensual dispute resolution that need to be ensured for effective access to justice?*

As one of the crucial principles, parties to a dispute should remain free to recourse to alternative means of dispute resolution before or in parallel to the formal introduction of the complaint. However, for collective ADR to be efficient and allow a fair settlement for consumers there must indeed be an 'alternative': ‘back-up’ by a judicial collective redress mechanism. The ADR alone is not sufficient and does not provide enough incentive for businesses to participate.[16] Furthermore, the use of ADR in Europe is diverse and closely linked to cultural traditions. The very name of 'ADR' should not even apply where the 'A' piece ('Alternative') – i.e. Collective Redress – is not really accessible to consumers.

We urge the Commission to take account of the specific nature of collective claims – possibly very large numbers of consumers, complicated evaluation of the case, aggregate assessment of damages etc. FSUG is strongly convinced that not every ADR body can be expected to have capacities to provide proceedings for mass claims, as is illustrated by the fact that currently there are very few schemes that do that[17]. Also, even where it exists, collective ADR can have serious limitations – the procedure is available only in respect of companies which are located in the same country[18], there is no way to order

[16] For example, in Italy a new bill on collective redress was supposed to enter into force in late 2008. While a telecom company was first willing to settle with its clients following an illegal behaviour, it withdrew from the negotiations when it learnt that the entry into force of the bill was postponed from January until July 2009.

[17] Spanish Arbitration System, Swedish and Finnish Consumer Complaint Boards.

[18] A collective arbitration procedure is organised in Spain since 2008 (Real Decreto 231/2008). The main problem relates to the fact that the competent authority is based in Madrid. For small or medium consumers associations not established in Madrid or near Madrid access to this ADR body means a high cost (i.e. transport, employing temporally solicitors/procurators, etc.). Furthermore, arbitration is only

interim/provisional measures (e.g. block the company's assets)[19]. Therefore, for multiple claims situations ADRs could be part of the "consumer toolkit", but never be the only mechanism available. For the same reasons it should not be mandatory to engage in an ADR before launching court procedures.

If collective consensual dispute resolution would be made mandatory first step before engaging in a collective judicial action, it is important to ensure that this step is effective and does not allow for the delaying tactics in order to make it more difficult to collect evidence that might be lost as the time passes, discourage potential claimants from taking the action, or make judicial action impossible at all in case prescription periods expire. Therefore it would be very important to establish certain safeguards, e.g.:

- if a settlement cannot be reached in a certain timeframe, parties can start a judicial action,
- parties can go to court to ask interim measures to be ordered, and
- prescription periods do not run for the period where the ADR is used.

Also, any collective out of court settlement reached must be approved by the court before being enforced due to the plurality of individual interests expressed in the complaint. This would solve the question whether the decision should be binding to the provider or all the parties involved since the settlement would be made enforceable by court. In case, a settlement occurs before, in parallel or after the claim is introduced, the judge must control its fairness and eventually reject the settlement. Furthermore, the group action claim should be suspended while negotiations are ongoing (preservation of rights).

The Dexia case – in which the Dutch consumer organisation Consumentenbond was involved – showed that pre-settlement costs can be very high up to the moment that a settlement is reached. Furthermore, it is uncertain for the consumer organisation whether (and to what extent) these costs will be compensated. This uncertainty makes it almost impossible to make sufficient use of the mechanism. Contrary to what is often said, settlement procedures can be very costly for plaintiffs' associations.

FSUG rejects the requirement of any binding measure or formal rules obliging the plaintiffs' associations to attempt settlement before going to court.

When adopting and implementing ADR schemes for collective claims, it is also necessary to ensure beforehand that effective alternative dispute settlements for individual claims are well-established. In this sense, consumer must first have confidence in ADR schemes for individual complaints in order engage in collective schemes.

Strong safeguards against abusive litigation

Q20: *How could the legitimate interests of all parties adequately be safeguarded in (injunctive and/or compensatory) collective redress actions? Which safeguards existing in Member States or in third countries do you consider as particularly successful in limiting abusive litigation?*

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possible when the dispute affects Spanish professionals. It cannot be used when the professional or company is registered in another EU country.

[19] The consumer organisation DECO was faced with a situation in which the defendant used the time of negotiations to 'disappear'. Even though DECO won the procedure, there were no assets left for the consumers when DECO was seized by the court.

Q21: *Should the "loser pays" principle apply to (injunctive and/or compensatory) collective actions in the EU? Are there circumstances which in your view would justify exceptions to this principle15? If so, should those exceptions rigorously be circumscribed by law or should they be left to case-by-case assessment by the courts, possibly within the framework of a general legal provision?*

Q22: *Who should be allowed to bring a collective redress action? Should the right to bring a collective redress action be reserved for certain entities? If so, what are the criteria to be fulfilled by such entities? Please mention if your reply varies depending on the kind of collective redress mechanism and on the kind of victims (e.g. consumers or SMEs).*

Q23: *What role should be given to the judge in collective redress proceedings? Where representative entities are entitled to bring a claim, should these entities be recognized as representative entities by a competent government body or should this issue be left to a case-by-case assessment by the courts?*

Q24: *Which other safeguards should be incorporated in any possible European initiative on collective redress?*

FSUG regrets the fact that the fears of an abuse of collective redress mechanisms have been overstated by businesses. Experience from those EU Member States where such redress mechanisms are already in place, proves that there has been no abuse or closing down of businesses[20]. For instance, the Portuguese consumer organisation DECO has brought several group action claims since the enactment of the legislation, all of which were deemed admissible by the judge.

We believe that the legal traditions in the EU, combined with appropriate safeguards would prevent abuses and allow for the respect of legitimate interests of both parties.

- **'Loser pays' principle**

'Loser pays' principle has been considered as one of the main safeguards against abuses. However, it can also act as a disincentive for instituting collective actions. Bearing in mind the public interest of collective actions that consumer organizations usually take, derogation from this principle could be justified. For instance, Portugal has a very effective and interesting system where the 'loser pays' principle is not applied to consumer organisations. Under the Consumers Rights Law, consumers who launch a 'popular action' are exempted from the preliminary costs of bringing a case. When the case is successful they do not pay the court fees, when it is lost they only pay 10 % to 50 % of these fees at the discretion of the judge (the plaintiff association might pay more only when the claim is considered abusive). In contrast, the defendant will have to pay the court fees whatever the outcome of the case. This system is excellent to guarantee full access to justice for collective claims

- **Punitive damages, contingency fees, discovery**

As Commission points out in the consultation paper[21], the US 'class actions' system contains strong economic incentives for parties to bring a case to court. These incentives are the result of a combination of several factors, among which the availability of punitive damages, the possibility of contingency fees and the discovery procedure.

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[20] Evaluation of the effectiveness and efficiency of collective redress mechanisms in the EU, Part I: Main Report, p. 78.

[21] P. 9.

It has to be underlined that those features, which are particular to the American legal system, are either not to be found in Europe or can be tackled in a future European mechanism by introducing appropriate safeguards, like e.g. payments for costs only according to a fixed scale as it is the case in the Netherlands[22].

For example, in instances where contingency fees would be allowed under national law, the judge should be given control over them. E.g. in Canada counsel's fees become payable only after they receive specific approval by the court. Class counsel bears the burden of proving that the fee is fair and reasonable. Another sanction that could be introduced is the reputational one, i.e. publicity and publication in two or more national newspapers in any Member State where users have been affected.

Overall, FSUG believes that it is possible to foresee a European style group action especially by giving great supervision power to the judge and we discuss this in a section below.

- **Role of the court**

The court has a crucial role to play in deciding on the admissibility of the claim, representativeness of the claimant, the ways to inform victims and throughout the procedure to ensure the effectiveness of the action. The judge should also determine how the compensation is to be organised.

Clear criteria have to be defined to determine if a claim is admissible or not. The court could consider whether:

- collective redress is the most appropriate redress option (e.g. more efficient in terms of costs compared to individual claims),
- it is based on sufficiently similar facts, and
- there are two or more victims.

However, the court must have the last word in applying those criteria to avoid spurious or vexatious litigation and, more generally, in assessing whether a claim is admissible and appropriate. The judge should check the seriousness of the claim and the representativeness of the group representative at the certification stage. A prima facie evaluation of the case on basis of objective criteria will avoid unmeritorious claims and eventual impairment of business reputation. If the case is rules unmeritorious, a possibility of appeal should be available.

Court control mechanisms and proportionality requirements would protect defendants against abuses of the system. Indeed a broad control of the court over the procedure would balance the interests of the plaintiffs and the interests of the defendant. In the specific case of the Dutch collective settlements, the court does not play any role in reviewing the fee arrangement between the class representative and the class.

FSUG would support having qualified judges and specific courts in each Member State competent to deal with mass claim cases.

It could be envisaged to set up a register of on-going group action proceedings (e.g. website).

[22] However the risk of abuse also exists in the fixed scaled system. In 2009 a Dutch law firm is accused of having persuaded thousands of victims of serious mass infringements to pay a fixed contribution, between EUR 700 and EUR 1 500 towards collective actions that never materialized. See Kassa, 31.10.2009, http://kassa.vara.nl/tv/uitzendingpagina/aflevering/kassa-12/.

- **Standing of representative bodies**

Furthermore, FSUG would like to stress that existing and well-established organisations representing interests of e.g. consumers, retail investors can be considered as a 'safety net' in the system. Their experience with enforcement actions, their limited resources and their reputation towards the public will ensure that only meritorious claims are pursued. As experience has proven, those organisations will reflect seriously before engaging resources in such litigation. This can be notably demonstrated by the high proportion of successful claims that consumer and retail investor organisations win when taking providers to court.

What regards the designation of the representative bodies that are granted standing in collective actions, we believe these bodies might be both:

- officially designated in advance according to the criteria laid down by Member States (as long as those do not use it to restrict collective action access to general purpose organizations only, but also, for example to retail investor and SMEs groups), and/or
- certified by courts on ad hoc basis. It is important to note that taking into account that collective redress should be possible in wide scope of areas and available both to citizens and SMEs, it will be possible to establish a full list of entities designated in advance, and there should always be a possibility for an ad hoc certification by the court, which will check the representativeness of the claimant taking into account the specificities of the case.

Another possibility would be to make a difference between groups which would be allowed to use an 'opt-out' procedure or an 'opt-in' procedure:

In the 'opt-in' procedure, victims have to come forward and declare that they intend to join the organised procedure.

In 'opt-out', all victims affected are automatically regarded as belonging to the group, unless they explicitly declare that they do not want to participate.

In order for the European Group Action to be attractive, efficient and manageable, it should allow both for an opt-out and an opt-in procedure. It should be up to the court to decide, on the basis of objective criteria, which approach is best suited for each case. Such criteria could be for example the nature of the claim, its value, and the number of potential victims.

In general the opt-out system may offer a better protection to victims especially when they are unaware that their rights have been infringed. This is also the case when the costs of a legal action are higher than the compensation the victim would get, and also when the products or services involved are complex (often the case in the financial services area) and therefore where the damage is difficult for individuals to evaluate. This approach is also easier to manage.

Recent experience in Europe of the opt-in procedure in consumer claims showed that the rate of participation is very low (less than 1%). On the contrary, under opt-out regimes, rates are typically very high (97% in the Netherlands and almost 100% in Portugal).

It is claimed that opt-out may sometimes be more difficult to combine with the freedom to take legal action. Yet, it does not necessarily limit the plaintiff’s freedom since people are able to withdraw from the group. In any case, this freedom has to be balanced against the need to ensure that all those affected can achieve access to justice.

In certain limited cases, an opt-in procedure might however be the best way forward for example when the damage is of high value or limited to a very restricted number of plaintiffs and caused by the same local provider.

The German proposal could also be mentioned: A qualified entity could, through a single action (model test case), obtain clarification for a multitude of consumers if the cases are based on the same facts. Following a corresponding public appeal, the injured consumers could declare their claims cost-efficiently in a register of claims kept by the court (opt-in) and interrupt hereby the limitation/prescription period of their individual claims. The outcome of the test case, a declaratory judgment, should be binding for the registered consumers who could pursue after that their claims individually on the basis of the stated facts in the test case.

- **Other control mechanisms to improve quality of class representation**

Besides the 'court supervision' mechanism explained above, there are other measures aiming at one hand, to reduce adverse effects of consumer information gaps and investment knowledge asymmetry that result in conflict of interest inherent[23] in collective redress mechanism and on the other hand, to monitor the performance of those representing the class.

These control mechanisms that improve the quality of class representation are the following:

- Government control has clear advantages in terms of legitimacy and credibility. The control is imposed by law and may be necessary to lay down minimum standards in the public domain.
- Private monitoring, its main advantage is that the private monitor has a financial incentive to perform his monitoring task well.
- Self-regulation (code of conduct) for class representatives. However, from the practical viewpoint it also has its drawbacks. For instance, in The Netherlands, responses to a recent initiative to self-regulate the collective redress sector are negative, with several industry members questioning the need of control and pointing the cost of running a self regulation scheme[24].

Overall, control mechanism may be best achieved by introducing measures via several different avenues and will require the analysis of exiting legal and procedural infrastructure per Member State.

Finding appropriate mechanisms for financing collective redress, notably for citizens and SMES

Q25: *How could funding for collective redress actions (injunctive and/or compensatory) be arranged in an appropriate manner, in particular in view of the need to avoid abusive litigation?*

Q26: *Are non-public solutions of financing (such as third party funding or legal costs insurance) conceivable which would ensure the right balance between guaranteeing access to justice and avoiding any abuse of procedure?*

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[23] Raising concerns, inter alia, over how to hold representatives accountable for their actions on behalf of the class and non transparent and complex systems of referral fees and charges.

[24] See algemeen Dagblad, 3.11.2009, p. 35.

Q27: *Should representative entities bringing collective redress actions be able to recover the costs of proceedings, including their administrative costs, from the losing party? Alternatively, are there other means to cover the costs of representative entities?*

Q28: *Are there any further issues regarding funding of collective redress that should be considered to ensure effective access to justice?*

In collective claims, several types of costs have to be borne. Some of which are inherent to collective actions, such as the preparatory costs for identifying the victims and gathering the claims (spread of the information, collection and checking of claims, coordination) and others apply to all judicial redress mechanisms (collecting evidence, making copies, certification, legal, court and expert fees), but can be increased due to the specificities of collective actions (high number of victims, complexity of evaluating damages, proving the infringement).

The total cost of this type of action varies widely from one country to another, since Member States are free to set the amount of their litigation fees. However, it may reach several tens of thousands of euro, even hundreds of thousands, particularly in countries where litigation fees are generally very high (i.e. the United Kingdom). On the other hand, in Spain, the judge can demand the disclosure of victims' identification from the providers involved. Even if banks are against disclosure measures by arguing on personal data protection and because there is not yet case law from the Spanish Supreme Court on this issue, most of judicial judgments have been in favour of this possibility.

Therefore the issue of funding is crucial; without appropriate funding, no group action mechanism will work in practice. We want to emphasise that consumer associations are not seeking profit out of these actions and only ask for the reimbursement of their costs.

In order to make collective actions practically possible, Member States should ensure that adequate mechanisms for funding of group action proceedings are made available. Different envisaged solutions:

- Derogation from 'loser pays' principle regarding court fees as outlined above and provisions on lawyers' fees (cap on fees and/or control by the designated court).
- Provisions establishing a Group Fund to finance access to justice (and certain conditions on the use of it with the view of avoiding abusive litigation).
- Provisions allowing for insurance to cover costs of proceedings.
- Provisions allowing the group representative to split the costs amongst group members, ask members of the group to join the organisation.

- **Group fund**

An interesting funding option can be found in Québec where the Law on Collective Redress provides for the creation of a special public fund to grant loans in order to finance collective actions. Loans from this fund are available on two conditions: the redress cannot be exercised otherwise and it relies on solid legal arguments (i.e. it is likely to succeed or at least is not unreasonable). Moreover, the beneficiary has to prove that the money will be used for the needs of collective redress. The loans can cover specific expenditures, such as lawyer fees, court fees, expert and advisers fees but also the defendant's litigation costs when the case is unsuccessful and any other useful costs related to the preparation or the handling of the case. The beneficiary will reimburse the loans only if the case is successful and only up to the received amount. Access to this fund is only available to a limited list of

people/organisations namely physical persons, non profit associations established under a certain provision of the Quebec company law, workers associations and cooperatives.

In Italy, administrative fines imposed by the competition authority following antitrust practices can be used to finance consumer organisations ‘projects. A similar mechanism (public funding) could be put in place to finance group actions open to individuals and SMEs. For example, fines collected by national financial supervisors could be used for that purpose as well.

Such funds could be instituted within the Member States but also at European level, indeed a share of the fines imposed by the European institutions could be deposited on a European fund and used to cover the costs of cross border cases or cases having a European dimension (involving European scale damages, European cartels…). Associations representing victims willing to bring such a large scale case could then 'apply' to receive funding.

This option would provide additional resources to fight against companies’ fraudulent behaviour, but it would also be a fair way to fund collective redress since the money of the fines would indirectly go back to consumers i.e. the victims.

- **Legal expense insurance**

In several Member States (Austria, Germany, UK, Netherlands, France), insurance schemes are already available and are widely used to finance litigation costs. Such schemes can take different forms. Both physical and legal persons can subscribe to a preventive insurance scheme (‘before the event’ insurance, BTE) to ensure that once they bring a claim before the court the insurance company will cover the litigation fees. In some countries, once a conflict has arisen an insurance contract can also be agreed between the claimant and the insurance company (‘after the event’ insurance, ATE) to cover all litigation fees or only the risk of having to pay the defendant costs in case the latter wins.

Preventive insurance schemes do not seem to be an adequate tool for collective litigation brought by individuals. Contrary to the tendency of professionals to subscribe to such schemes, individuals rarely do so (except when it is included in other insurance policies like in motor policies and increasingly in household policies such as is common in Portugal, the United Kingdom, Denmark). Indeed people usually feel safe and do not envisage having recourse to judicial proceedings. More importantly, some features of BTE insurance make its use uncertain for group actions in general:

- a BTE insurance policy will usually only cover the group members’ own legal costs, and hence, it will be necessary for the Consumer Organisation to take out an ATE policy, to protect the insured (itself, or the group members) against the liability of their own disbursements and for the adverse costs, should the defendant win the collective action;
- BTE insurers may seek to exclude or to limit insurance cover where the claimant seeks to invoke the policy in the context of grouped proceedings.
- BTE insurance would also represent the additional financial load for the smallest organisations for which it can be very burdensome.

After-the-event insurance is used in few Member States i.e. Austria, Germany, The Netherlands and the United Kingdom. This mechanism is not widely used, even though it is recognised more and more by some as being a potential solution for the litigation funding issue. It is important to note that legal insurance also tends to be much more regulated than,

for instance, third party funding, and therefore present advantages over the latter. However as this mechanism is still in its infancy, the market remains restricted to fair competition and as a result, premiums remain high. Furthermore, some consumer organisations are critical with insurers having the right to stop their engagement and thus to bring the court procedures to an immediate end.

Legal expense insurance may lead to a better access to justice for organisations representing victims. As a consequence this possibility could be extended. However in order to achieve an efficient protection for organisations representing victims, the market needs to be better regulated and premiums must be reasonable. To this end competition between insurance must be stimulated within an appropriate regulation framework.

- **'Loser pays' and adjustments in court fees**

The principle of losing party paying the adverse costs is well established in European jurisdictions and is one of the safeguards against abusive litigation. However although the risk of bearing the defendant's costs can prevent unmeritorious and frivolous claims, it may also become a disincentive for serious claims since claimants face the risk of having to pay both parties' costs. To accommodate this situation, the judge usually has the power to decrease the amount to be reimbursed and most Member States provide for adjustments to the principle for specific cases.

In France and Italy, the judge can decide not to apply the loser-pays rule when the claim brought was not unfounded and the defendant has enough financial means to cover the expenses.

Portugal has a very effective system where the 'loser-pays' principle is not applied to consumer organisations (already mentioned above). Under the Consumers Rights Law, consumers who launch a 'popular action' are exempted from the preliminary costs of bringing a case. When the case is successful they do not pay the court fees, when it is lost they only pay 10% to 50% of these fees at the discretion of the judge (the plaintiff association might pay more only when the claim is considered abusive). In contrast, the defendant will have to pay the court fees whatever the issue of the case. This system is excellent to guarantee full access to justice for collective claims.

In Spain, the loser-pays principle usually applies, however a reduction or even exemption of litigation fees can be awarded in favour of consumer associations.

- **The possibility to recover administrative costs**

In addition to the funding issues described above, there should be the possibility for the winning organisation to recover its administrative costs (e.g. those that this organization incurred while preparing action for court) provided of course that those costs are reasonable[25]. The judge could again have control over deciding what parts of those costs are recoverable.

[25] E.g. Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, Article 16 states that "…the court or tribunal shall not award costs to the successful party to the extent that they were unnecessarily incurred or are disproportionate to the claim".

Effective enforcement in the EU

Q29: *Are there to your knowledge examples of specific cross-border problems in the practical application of the jurisdiction, recognition or enforcement of judgements? What consequences did these problems have and what counter-strategies were ultimately found?*

Q30: *Are special rules on jurisdiction, recognition, enforcement of judgments and/or applicable law required with regard to collective redress to ensure effective enforcement of EU law across the EU?*

Q31: *Do you see a need for any other special rules with regard to collective redress in cross-border situations, for example for collective consensual dispute resolution or for infringements of EU legislation by online providers for goods and services?*

Associations representing victims can be confronted with problems arising from the current rules on jurisdiction due to Brussels I provisions[26]. The following problems have also been identified:

- Multiple Member States may have jurisdiction over a consumer claim.
- Risk of forum shopping: given the perceived differences between Member States' legal systems in terms of both substantive law and procedural rules there may be a 'rush to the courts' of supposedly 'claimant-friendly' jurisdictions
- In some Member States only consumers residing in that country can benefit from an opt-out, whereas consumers from other Member States have to opt-in or cannot participate at all.

Possible additional principles

Q32: *Are there any other common principles which should be added by the EU?*

Scope of a coherent European approach to collective redress

Q33: *Should the Commission's work on compensatory collective redress be extended to other areas of EU law besides competition and consumer protection? If so, to which ones? Are there specificities of these areas that would need to be taken into account?*

As stated earlier, the Commission's work should not be limited to "competition and consumer protection" in a restricted sense. As stated above, it should at a minimum include all financial services users, such as savers, retail investors, life insurance policy holders, pension fund participants, small and individual shareholders, employee shareholders, SMEs and local governments. It should also include personal data protection which shapes any commercial and consumer policy.

[26] Example of food poisoning case in Austria, where VKI, the consumer organisation, was able to bring a group action for compensation only on behalf of Austrian consumers who had booked through an Austrian company. Due to Brussels I and the ECJ on Shearson Hutton it was not possible to represent Austrian consumers who had booked their holiday with the same tour operator through the Swiss (not Austrian) branch, so those consumers were left without redress.

Q34: *Should any possible EU initiative on collective redress be of general scope, or would it be more appropriate to consider initiatives in specific policy fields?*

As stated earlier, FSUG asks for a minimum harmonization directive on collective redress, but the scope must be as large as possible (see Q33 above).

Annex to the FSUG response to the EC consultation on collective redress: Examples of mass claims and lack of compensation in the financial services area

At cross-border level

- In Madoff case a number of banks in Germany, France, Spain, Portugal and the UK agreed to compensate their clients – victims of the Bernard Madoff fraud investment scheme. However, for instance Swiss banks refused to participate in the settlement. Also, in the absence of a European group action instrument, settlement on a national level was the only possibility for claimants, whereas if the European instrument was available, all claimants against the same bank could have joined in one action.
- Similarly, in Lehman Brothers case, various banks in Belgium, Germany, Austria, the Netherlands, Italy, etc. sold Lehman Brothers financial products to the investors in many countries. Following the collapse of the latter company, various court or settlement actions were initiated in different countries.

In Austria

- The Austrian Consumers' Association (VKI) gathered round 6 500 complaints (by March 2009) referring to one single large sales organisation of financial services which sold real estate-shares by means of highly questionable sales practices.
- In the enforcement of claims owing to inadmissible interest clauses, the Chambers of Labour have asserted a number of claims of the same kind against the same defendant. Due to the big and rather time-consuming efforts of the Chamber of Labour round 4 000 small investors in real estate-certificates have been profiting from a complex out-of-court settlement with the bank involved.

In Belgium

- In Belgium, various increases of insurance premium were declared illegal by Court decisions under injunction procedures. Those legal orders stop illegal practices for the future but offer no compensation for damages suffered by up to a million consumers.

  In 1998 the Belgian consumer organisation Test-Achats filed a complaint against certain provisions in general conditions of contracts offered by Dexia bank. In July 2007 the Court of Appeal of Liège ruled in favour of Test-Achats' claim. Notably, the provision that allows the bank to offset the negative account balance against a positive balance in another account was ruled unfair. Many other banks in Belgium had to review their general conditions to comply with legislation. In the absence of a group action procedure consumers who were harmed by unfair contract terms are unable to get redress.

In France

- In January 2010, the Crédit Foncier de France was fined EUR 50 000 for being guilty of misleading commercial practices on the essential qualities of home loans sold between 2005 and 2007. In the absence of group action to bring together all affected consumers to obtain full compensation for the damage, UFC-Que Choisir and Collective Action – a group of customers misled by the Crédit Foncier – had to engage with the bank in lengthy and difficult negotiations, due to the absence of a group action mechanism, to secure the running contracts and obtain compensation for consumers. 150 000 consumers were affected.

- The CREF case (French pension fund): CREF was a non mandatory pension fund opened to most French civil servants. It provided a very exceptional commitment to the subscribers: the savings and the retirement annuities are indexed on civil servants general salary increases, therefore providing a quite unique protection against future long term inflation. In 1989, the French Government granted it an also very exceptional tax advantage: the contributions are deductible from the taxable income of participants. Therefore, CREF could attract as many as 450 000 subscribers by the end of the nineties.

  In 1999, a late control from the Government supervisor found that the fund was largely and illegally underfunded, by at least EUR 1.6 billion. In 2001, CREF lowered all current and future benefits by 17 %. In 2002, it dissolved itself and transferred its assets, liabilities and deficit to a newly formed institution:

  Pushing about 80 000 pension savers of CREF to withdraw and loose more than half of the value of their savings. For those who remained, the indexation guarantee was repelled and since then the subscribers have lost an additional 11 % of the value of their savings and pension annuities.

  An association of the CREF victims was formed in 2001 to help them defend their rights. Now – 10 years later – about 6 000 individual claims have been filed against the CREF institution and its successor and also against the French State for failing to supervise the fund properly. These plaintiffs had to pay around EUR 100 as a lawyer's fee and pay EUR 30 to 40 every year since 2001 as membership fees to the defense association. This is because the association had to hire up to 6 FTEs to manage the thousands of individual files. The lawyer did not have the means to do that. Also, the lawyer could get only benevolent help to evaluate the damages, which were quite complex and technical to assess and quantify.

  In June 2010, the Administrative court of appeal of Paris condemned the French State to indemnify 20 % of the quantified prejudice of a few hundreds of plaintiffs. The legal procedures against the mutual insurer and his successor are still before the civil Court of Appeal of Paris.

  So, 10 years after the initiation of the proceedings, many of the victims are now dead, and only very few have been indemnified and very partially. The Pension Institution still does not inform the participants about the real reasons for the damages and has not informed them of the possibility to get indemnified partially by the French State.

In Romania

- Romania does not have a collective redress mechanism. This situation became a particular problem in 2010, when some clients with loans decided to go to court. They argued that the bank charged a higher interest rate than the one provided in the credit contract. They considered that the meaning of 'variable reference rate' was EURIBOR and not an internal 'prime rate' 8 times higher.

  Groups of 50–300 clients were formed ad-hoc. They contacted several lawyers for defending their rights in so-called "collective trials".

  The procedure implied that each consumer had to give an individual mandate to a lawyer. All consumers had to enter the scheme at a certain moment, no subsequent admission available.

- One important aspect that gave birth to these groups was represented by the lower fees paid by clients compared to an individual trial. On the other hand, consumers considered that 'power resides in numbers'.

  This first step was an important signal that collective redress could find a great number of supporters in Romania, when a specific legislation will be in force.

  Beside the request of changing the interest rate, the consumers demanded that monthly instalments due to the bank should be suspended until the end of the trial. This request was not accepted by the court and judge decided that the group composed of 80 clients has to pay to the bank involved 100 000 lei (about EUR 25 000). This means more than EUR 300 per client, a level extremely important for Romania, close to the level of the average monthly income.
- A second similar case took place in March 2011, when judges decided that another group of about 200 clients need to pay 56 000 lei (about EUR 14 000) to the bank.

  These decisions were criticised by the most representative Romanian NGO for consumers (APC Romania). They said that "the lack of clear rules on collective redress, to prevent such exaggerated costs, will determine consumers to be more reluctant in the future regarding their right to go to court." – read full press release at http://www.apc-romania.ro/comunicate/pozitia-apc-romania-fata-de-decizia-tribunalului-de-a-respinge-cererea-clientilor-bcr-de-suspendare-a-platii-ratelor.

In Slovenia

- A number of Slovene consumers have opted for savings plan contracts with Slovenia's largest bank Nova Ljubljanska Banka (NLB) – they entered into annuity savings contracts. The Annuity Savings Plan is a long-term (even up to twenty years) instalment savings product. The contract in question included a covenant that the interest rate would be kept unchanged throughout the savings period; however, the bank took the liberty of changing the interest rate unilaterally. In this particular case the bank decreased the interest rate without informing savers about it. What is more, the contract did not include the right of consumers to withdraw from the contract. Following the involvement of the national consumer association ZPS, the bank started making settlement arrangements with consumers, as part of which it has partly been paying back interest rates it had failed to pay in sufficient amounts in the past. ZPS does however believe that should consumers opt for filing compensation claims in the court, the amounts of money received would be even higher. Unfortunately the option of making collective compensation claims does not exist in Slovenia yet, and consumers do only rarely decide to introduce individual compensation claims.

In the Netherlands

- Since the introduction of the Wet Collectieve Afwikkeling Massachade ('Collective Settlements Act') some critical discussions on whether The Netherlands could become a hotspot for international class actions.

– Recently, in a interim decision, the Amsterdam Court of Appeal[27] assumed jurisdiction in a case that does not have a particularly close connection with the Netherlands. The case concerns a Swiss reinsurance company, Coverium, of which the common shares were listed on the SWX Swiss Exchange. American Depository Shares were listed on the New York Stock Exchange. Converium's share prices declined after the company announced increases to its loss reserves between 2002 and 2004. These announcements led to securities class actions in the US, which were ultimately settled and approved by the US District Court. However, this Court declined jurisdiction in respect of claims brought by any shareholder who had not bought Converium shares on the New York Stock Exchange and who was at the time of his or her investment living or based outside of the US. A Dutch foundation was subsequently established, Stichting Coverium Securities Compensation Foundation, to represent non-US shareholders.

  Converium and the foundation then jointly filed a request under the Collective Settlements Act with Amsterdam Court of Appeal. In an interim decision of 12 November 2010, this Court assumed jurisdiction over the case, based on Article 6(1) Brussels I Regulation (and equivalent provisions in the Dutch Civil Code of Civil Procedure and in other treaties between The Netherlands and foreign states). Here, 200 out of approximately 12 000 injured shareholders were known domiciled in The Netherlands and considered that all claims were 'so closely connected'. As in the Royal Dutch Shell case, the court considered this a sufficient basis to assume jurisdiction over the Converium case.

  In addition, the Amsterdam Court of Appeal made a specific point of mentioning an additional ground for its jurisdiction. According to the Court, request under the Collective Settlements Act can also be viewed as 'matters relating to the contract' within the meaning of Article 5(1) Brussels I Regulation. As the performance in question – the payment of compensation to duped shareholders – will be administered by a Dutch foundation using Dutch bank accounts, the Court considers that it also has jurisdiction.

  Interesting to highlight here is that while Court's interim decision is not final and interested parties may still come forward and advance different views on this jurisdiction issue, the Converium decision sends an open invitation to parties who are domiciled in jurisdictions that do not offer collective settlements on opt-out basis- provided that the parties create a Dutch foundation and ensure payments under the settlement will be made in the Netherlands.

  This case warms on how foundations, commonly used as litigation vehicles, can be created with relative easy and low cost. Nevertheless, shows the need to ensure that such vehicles are adequately controlled.

[27] This Court has been given exclusive jurisdiction – by the Collective Settlement Act – to review the collective settlements and to declare it binding upon all members of the class.